Questions Presented for Review

1. Was the defendant-petitioner denied due process of law under the XIV Amendment in a quasi-judicial proceeding by the prosecutor, without arraignment, after a prolonged and massive police interrogation when the petitioner "suspect" became "defendant" without being advised of his constitutional rights that he might remain silent, be represented by counsel and that what he said could be used against him and would a violation of these fundamental rights vitiate a so-called unsigned and involuntary "confession" extracted under these circumstances?

A. May we accept as evidence the alleged "confession" extracted during the very course of (at least) quasi-judicial proceedings, when the time for investigation had passed and when the petitioner was no longer a "suspect" but then a "defendant" and where police and prosecutor failed to observe the "fundamental fairness" essential to the very concepts of justice?

2. At what point in a police interrogation which takes the form of an inquisition does the status of "suspect" become "defendant" which would entitle him to arraignment, without unnecessary delay, before an examining Magistrate and to be advised of his legal and constitutional rights?

3. Would the holding of a "suspect" in custody incommunicado for upwards of twenty (20) hours without arraignment, without counsel, without advice of his rights and without sleep, or rest and little food and scant clothing through a freezing cold night of around-the-clock police massive interrogation culminating in a prosecutor-conducted and deceptive inquisition extracting a so-called "confession", as the sole evidence of the People's case; and the subsequent unlawful averment or acknowledgment of the accuracy of a question and answer statement, justify the

outlawing of this involuntary and unsigned "confession" and the reversal of said conviction based thereon?

4. Would the subsequent testimony of the defendant at his trial when he recanted said confession as "made-up" and "lies" and told a story implicating another, absolve the unlawful effect of the so-called "confession", even though said "confession" was used and employed by the People in support of the prosecution throughout the trial, throughout the summation and final argument on behalf of the State and stressed in the Judge's charge and was concededly and solely the People's case?

5. Was the presence of a juror, a member of the current trial jury panel, which "juror" was concededly present and participating in the investigation, interrogation and "confession" of the petitioner at police headquarters, at the scene of the crime, and elsewhere, and at the prosecutor's office, as well as the presence of a member of the Grand Jury Panel, so prejudicial and detrimental to the interests and fundamental and constitutional rights of the petitioner as to deny him a fair and impartial trial by a jury of his peers, in violation of the due process clause of the XIV Amendment?

6. Was the Judge's charge, wherein the trial Judge himself a father of a 15-year old girl, presiding, (involving a murder of a 15-year old girl) overcome emotionally during the trial and delivering a charge to the jury that amounted to a scathing denunciation in the case, an erroneous and misleading enunciation of the evidence in the case, in reviewing solely the People's case and not saying one word about the defense, whether there be "voluntariness" of the confession, degree of "temporary insanity" or whether the alleged crime could have been committed by some other person as petitioner so contended; and over and over again repeating the highly prejudicial and inflammatory descriptions of "braining" "decerebration" "skull-crushing" "blood-stained area" "blood-drenched

rocks" "blood-marked baseball bat" "death-dealing" blows, "Body torn" "mutilated" "clothing torn away" "breasts exposed" "brains separated from the head" "face bashed", etc., in a most gruesome and word-sordid portrayal imaginable *far* from what to be expected from a fair and impartial trial Judge, summarizing fairly and impartially both sides of the case and the applicable law for the State and defense; such a departure from the accepted and usual course of judicial behavior as to deny the petitioner a fair and impartial trial under the XIVth Amendment of the United States Constitution?

7. Was the failure of the trial Judge to submit to the jury under this common law murder indictment all possible degrees of homicide including the crime of manslaughter, as well as murder in the first and second degrees, such a departure from the usual standards of judicial procedure as to be in deprivation of the defendant's fundamental rights and a violation of due process in violation of the XIVth Amendment?

8. Was the introduction into evidence, over objection, of highly prejudicial and inflammatory color slides and color enlargements (16 x 20) of the deceased and scene of the crime and not materially or essentially necessary to the proof of the People's case and on continuous display in front of and in the presence of the trial jury throughout the trial, such a departure from the usual standards of judicial procedure and a denial to the petitioner of a fair and impartial trial, as to be in deprivation of his fundamental rights and in violation of the due process clause of the XIVth Amendment?

A. Was any logical relevance of such exhibits so overwhelmed by their inherently prejudicial qualities and of a psychological nature, that should have precluded their admission into evidence?

9. Was the serious inadequacy of the trial attorney of such import in his inadequate representation of petitioner

and presentation of his defense and to such a degree as to denote a failure of defense and denial of counsel under the XIVth Amendment of the United States Constitution and be a denial of due process?

10. Was the denial of the trial court, on a motion for a new trial, based upon newly discovered evidence showing a false alibi of a "prime suspect" implicated by the petitioner and "a pre-judging" by a prejudicial trial juror, such an abuse of discretion in denying the petitioner a fair and impartial trial as to be considered denial of due process under the XIVth Amendment?

A. Was the failure of the trial judge to hold a proper hearing under said motion for a new trial, examining into the time of death which was most crucial in the People's case and the petitioner's defense, such a departure from the usual standards of judicial procedure as to be a denial of due process of law?

B. Was the failure of the trial Judge upon the presentation to him of a showing or at least a serious suspicion of "perjury" in the trial concerning the presentation of a "false alibi" by a "prime suspect" other than the petitioner, such a dereliction and neglect in not conducting a full inquiry and hearing as a committing magistrate, as to be considered a departure from the usual standards of judicial procedure and a denial of due process of law to the petitioner?

11. Was the motion for a new trial based upon newly discovered evidence, such a judicial proceeding as to require the presence of the defendant-petitioner at such stage of the proceedings, and would the denial of the production of and the presence of the defendant-petitioner at the said hearing of substantial issues of fact as to events in which the defendant-petitioner participated, be such a denial of due process of law and deprivation of his fundamental right to be present at every stage of the proceedings, so as to constitute a violation of the VIth Amendment of the United States Constitution?

Constitutional and Statutory Provisions Involved

The Constitutional provisions involved in this case are the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States, the pertinent portion of which reads as follows:

Sec. 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. C. A., Constitution, Amendment 14.

Article V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The New Jersey Revised Statutes (Rule 3:2-3 of the Rules of Criminal Procedure), provide:

"(a) APPEARANCE. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereto. A preliminary hearing before the magistrate shall be held forthwith.

(b) PRELIMINARY HEARING. The magistrate shall inform the defendant of the complaint against him, of his right to retain counsel or, if indigent, of the privilege of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him. If the offense charged may be tried by the magistrate upon waiver of indictment and trial by jury, the magistrate shall so inform the defendant. All waivers of indictment and trial by jury shall be in writing, signed by the defendant, and shall be filed and entered on the docket."

Statement of the Case

Briefly, the petitioner, a twenty-three year old ex-Marine, married with one child, was convicted of the murder of one Victoria Zielinski, a 15-year old girl, at Mahwah, in Bergen County, New Jersey, on the night of March 4, 1957. He was tried in the Bergen County Court amidst an atmosphere of wide-spread publicity in the public press and intense hostility at the time and during the trial and inflamed prejudice by the Prosecutor and Pre-

siding Judge at the time of and during the trial; convicted on May 13, 1957, and sentenced to death on June 4, 1957.

The petitioner appealed said Murder conviction and death sentence to the New Jersey State Supreme Court, which was sustained on June 25, 1958 (27 N. J. 433-466 (1958)).

Thereafter, petitioner moved for a new trial, based upon newly discovered evidence, which was denied by the trial court Judge. Petitioner then sought to review the denial of said motion by appeal to the New Jersey State Supreme Court, which affirmed the holding of the lower Court on May 4, 1959 (29 N. J. 561 (1959)).

Defendant is now held in the Death House, at Trenton, New Jersey, under a new death warrant (the execution being stayed, by this Honorable Court, *supra*).

The Facts

We accept the following statements from the opinion of the Supreme Court of New Jersey as correct, so far as they go:

"On March 4, 1957, at about 8:35 P. M., the deceased, Victoria Zielinski, 15 years of age, was walking along Wyckoff Avenue, Ramsey, New Jersey. She had visited a friend and was on her way home, more than half a mile away. The defendant, Smith, who knew her casually, happened along in a borrowed car and undertook to drive her there. Instead of going directly to her home, he drove to an isolated sand pit in the neighborhood and parked. There, according to his confession, for no apparent reason the young lady said she was going to get out of the car and walk home. She said also that she intended to tell her father that he was "like the rest of the guys". He tried unsuccessfully to prevent her from getting out and when he tried to follow her, she began to yell and slap at him

He then swung at her "as hard as" he "could" with his right hand: "I don't know whether it was a fist or a slap or what." He did not know if he actually struck her. From that point on, things were vague in his mind, i.e., "that's where somebody pulled the switch." He next remembered getting back into the car alone. In the interval of vagueness he did not know whether he had struck at her more than once or whether he did so with an object other than his hand. He had a "feeling of running somewhere" or "chasing somebody". He thought he recollected "running in the sand with my shoe off." On getting back into the car, his right foot was cold; later he became aware that he had lost his shoe. When he left the sand pit, Victoria's schoolbooks and pocketbook were in the car. After proceeding a short distance, he thought he probably threw them into the woods. In accordance with information furnished by him, the police later located them there. On reaching home, he realized that his khaki trousers and socks were bloody. He changed the trousers, went back to the pit with a lantern, and retrieved his right shoe. Later the trousers, socks, and shoes were disposed of in the manner referred to in Justice Wachenfeld's opinion. 27 *N. J.* at 444-445.

At the trial, Smith testified that he and Miss Zielinski quarreled while they were parked at the sand pit and he told her to get out of the car. She did so and started walking down the road. The events that allegedly occurred thereafter are recited in the earlier opinion as follows:

> "A few moments thereafter, while he was preparing to leave the pit, defendant heard a commotion and saw two figures coming up the road. He quickly got out of the car and his 'bad' ankle, which had been struck by a bowling ball earlier in the day, collapsed under him, his right shoe coming off. Since the identities of the oncoming persons were unknown and it was a lonely spot, he seized the baseball bat from the back seat of the car for protection.
>
> "As the figures approached, he recognized them as Victoria and D. H. what had happened, and the

> latter replied the girl had fallen on the road. Smith examined the wound and in the process got blood on his hands and trousers. Feeling she should be taken to a doctor, he placed her in the automobile, but D. H. grabbed her and forcibly pulled her out, telling Smith to leave her alone, that he, D. H., would take care of her. Victoria pleaded with Smith for succor, but since D. H. knew her much better than he, Smith decided he should not interfere further and drove off, leaving his shoe and the baseball bat behind." 27 *N. J.* at 446-447.

Smith's home was a short distance away. He drove there, washed up, changed his trousers, telephone Joseph Gilroy, whose car he had been driving, and departed at about 9:10 p.m. to pick Gilroy up. On the way, he revisited the said pit and retrieved his shoe.

Repetition of the above portion of the facts of the tragedy has been engaged in to point out the time element involved. On the basis of Smith's testimony at the trial, he picked up Miss Zielinski at about 8:34 p. m. (although at one point he said it was about 8:40 or 8:45 p. m., "it could have been later or could have been earlier.") He must have left Miss Zielinski and D. H. (Don Hommell) at the said pit before 9 p. m. because after driving home, talking to his wife (who testified he arrived home shortly before 9 p.m.), washing up, changing his trousers and socks, attempting unsuccessfully to start a gasoline heater in the trailer where they lived, and making his telephone call, he left home at about 9:10 p. m. to pick up Gilroy. Thus the import of his allegation at the trial was that D. H. (Don Hommell) appeared at the said pit shortly before or around 9 p. m. And the conclusion which the defense sought to have the jury reach was that Don Hommell committed the murder."

To this should be added the following: (taken from the summary in the original appeal opinion in the New Jersey State Supreme Court):

Because the weather had been below freezing the county medical examiner was unable to fix precisely the time of death, but his estimate placed the time of death "around 12:30 or 1:00 A. M.—* * * give or take an hour".

The death certificate signed by him (but not produced at the trial) discloses the time of death "about 10:00-11:00 P. M." The autopsy medical report revealed the cause of death as "total crushing of the skull with decerebration, traumatic" * * * by a rock or stone; death was instantaneous.

Acting on information supplied by Gilroy (from whom petitioner borrowed the car used the night of the tragedy) at about 11:30 P. M. on March 5 (1957), Detective Graber and other officers went to Ridgewood and took Smith into custody. Smith was removed to Mahwah Police Headquarters and there interrogated. After all-night interrogation by police and prosecutor and after his trip to the sand-pit in the company of the officers, Smith was taken to the prosecutor's office and questioned further by Detective DeLisle (attached to the prosecutor's office staff) who testified that Smith broke down that morning and made certain "admissions". Subsequently, the petitioner gave the "confession" (note—Exh. S-84). Subsequently Smith, on the advice of his attorney, refused to sign the statement ("confession") but allegedly conceded its accuracy. It was admitted into evidence at the trial, over objection.

The "confession" was "vague", as to the recollection of the events of the night of the tragedy.

Post-script to murder: *The petitioner, concededly, was at or near the scene of the crime late (then 9-9:30 P. M. night of the tragedy.*

Reasons for Granting Petition for Writ of Certiorari

The compelling reasons in this capital case for granting the petition for writ of certiorari hereinare set forth in the "QUESTIONS PRESENTED FOR REVIEW" assuming the questions to be the said facts; and the points raised in the "ARGUMENT" that follows herein, all showing a denial of due process of law and an invasion of the petitioner's constitutional and fundamental rights under the Vth, VIth and XIVth Amendments to the United States Constitution.

The petition herein is addressed to the sound disgretion of this Honorable Court because this Murder conviction and death sentence involves a review of the above as well as the interpretation of a state statute under the United States Constitution (not before decided by the highest Appeal Court in the State of New Jersey), lawfully requiring an arraignment without unnecessary and unreasonable delay before a magistrate; right to counsel; right to examination; and the effect of an unsigned and involuntary confession extracted after an extended interrogation and inquisition by the police and prosecutor, sole and primary evidence in the people's case, convicting petitioner of Murder and sentencing him to death; the denial of a fair and impartial trial; inadequate defense presentation and representation; failure of submission to the trial jury of all possible degrees of homicide; the absence of the petitioner at a judicial hearing for a new trial; the unlawful presence at various stages of the investigation, interrogation and "confession" of the member of the Grand Jury Panel and Trial Jury Panel; and the sanctioning of departure by a Lower Court from the accepted and usual course of judicial proceedings and to call for the exercise of this Honorable Court's power.

ARGUMENT

I

The petitioner-defendant herein was denied due process of law under the Fourteenth Amendment by the admission into evidence over objection of an unsigned so-called "confession", the sole evidence convicting him of murder which was taken from him involuntarily and while in custody after the said petitioner was held incommunicado for a period of upwards of twenty (20) hours through a freezing cold night in an around-the-clock prolonged and massive inquisition by in excess of a dozen officials, without counsel, no sleep, no rest, little food and scant clothing, culminating in a prosecutor-conducted, deceptive and extended interrogation extracting said "confession", allegedly under oath when he (petitioner) was no longer "suspect" or witness but a "defendant" and without being advised of his constitutional rights that he could remain silent and be represented by counsel and without arraignment; and the subsequent unlawful attempt by the prosecutor, after his (petitioner's arraignment and being represented by counsel of record and subsequent indictment to further trick and cajole him in signing said "confession" by a stealthily unauthorized visit to his prison cell, which statement and the averment or acknowledgment of the accuracy or truth of same were unlawfully obtained and admitted in evidence against him.

The alleged "confession" (in the form of a transcript of interrogatories) was objected to in the Court below both as to whether the same could even be considered a "confession" and as to its "voluntariness". A reading of the said "confession" (Exh. S-84)* by this Honorable Court

* Unless otherwise indicated all references are to pages of the trial record.

would clearly show that it was strange indeed for this petitioner to "voluntarily", as the State contended, "confess" a crime without possessing the basic and fundamental elements and knowledge so vitally and legally necessary, as to how the crime was even perpetrated.

This case goes beyond the holdings of the *Crooker v. California*, 357 U. S. 433, and *Cicenia v. Lagay*, 357 U. S. 504 (where the bare fact of police detention and police examination in private of one in state custody did not per se render involuntary and unlawful a confession by one so detained), and, as in *Spano v. New York*, decided June 22, 1959, this Honorable Court held:

> "The police were not therefore merely trying to solve a crime, or even to absolve a suspect. Compare Crooker v. California, supra, and Cicenia v. Lagay, supra. They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these."

We maintain that the petitioner's status here changed from "suspect" to "defendant" and, as such, he was lawfully entitled to every safeguard that the law and the United States Constitution give to him (See *Spano v. New York, supra*).

If this were not so, the status of "suspect" or "witness" would never change and one could thus be held incommunicado without warrant, without charge, without counsel, without arraignment, *ad infinitum*.

At what point, we ask, does the "suspect" or "witness" status become that of "defendant"?

At what point in the so-called investigation does his status change from "suspect" or "witness" to "defendant?"

Or at what point would the "suspect" become absolved; provided he withstands the inquisition and does not by fatigue, undue influence or as a "means to an end" succumb and "confess"?

Of course, each case is dependent upon the facts and circumstances; but what is the yardstick—minutes, hours, days? Would twenty (20) hours be too long? Or thirteen (13) hours too short?

In *Ashcraft v. Tennessee*, 322 U. S. 143 (1944) thirty-six (36) hours was considered too long and shocked one's conscience; other cases held as little as seven (7) hours was unlawful (See *Mallory v. U. S.*, 354 U. S. 449).

In the instant case, we have a lapse of thirteen (13) hours from 11:00 the night of March 5th, when the petitioner was taken into custody, to about 1:00 P. M. of March 6th, with the extended inquisition and interrogation that led to the "confession"; and the further extension of the inquisition seven (7) hours more until the evening (7:00 P. M.) before the petitioner was arraigned on a charge of "murder", a total of *twenty (20) hours* that the petitioner was thus unlawfully held.

Surely, the petitioner did not steadfastly deny his participation through the night to expert police interrogators and then suddenly decide the following day to "confess" to the prosecutor.

The proceeding before the Prosecutor in the County Courthouse where his offices are situated, was in the nature of a quasi-judicial proceeding; but it utterly lacked the standard of protection that the Constitution guarantees to every defendant. The proceeding should have lawfully been before an examining magistrate, in an open courtroom, with all legal safeguards.

Prior to his "confession" to the prosecutor, the Petitioner had made "incriminating admissions" after prolonged and exhausting questioning by the police, by placing himself at the "scene of the crime" on the "night of the crime", by identifying the clothing that he had discarded, particularly his shoes, which proved to be (according to the police) an exact duplicate of the plaster cast impression (Exh. S-75) found at the scene of the crime (p. 469a). As a matter of record, "*Acting on the information supplied by one Gilroy* (the owner of the Mercury car Petitioner borrowed that night) that he noted blood stains in his car and of the baseball bat being missing from his car (subsequently discovered near the scene of the crime, ingrained with blood) at about 11:30 P. M. on March 5th, *Detective Graber and other officers went to Ridgewood and took Smith into custody.* Smith was removed to Mahwah police headquarters and there interrogated." By strange coincidence and circumstance, *this was the very site* of petitioner's arraignment, at about *7 P. M. on March 6th, twenty (20) hours later!* Was there not sufficient to hold the petitioner as a defendant for murder? If not then, when? (See *infra.*)

Subsequently, he is supposed to have "broken down" to the police, in the morning after the all-night grilling, and admitted "that he met the girl that night on the road and that he had picked her up in his automobile and taken her to the said pit (p. 519a). He said she had babbled something about school and a note, that she got excited and that she attempted to get out of the car, he held on to her and she had the advantage because she was on the door side of the car and she pulled him out of the car. He said he got excited and he hit her and he indicated in this way (indicating), he said a good shot" (p. 519a).

Although there was sufficient circumstantial evidence to hold the petitioner as a defendant (*although not to convict him without a confession*) he was not booked or ar-

raigned as a defendant when taken into custody (*supra*) or even after the all-night inquisition by a relay of police officials (including the prosecutor) after being dragged through the night from police station to station to the "scene of the crime" and literally dragged through the streets searching for further clues "to hang" the petitioner.

The stage was set the following day for a "confession", not just a question-and-answer session with the prosecutor. Apparently the police made the defendant "ready" after the all-night *inquisition* and the "lamb was now ready for the slaughter." After being "introduced" (to the police officers, the prosecutor said he already knew), the prosecutor opened his quasi-judicial "confession session" by saying (Exh. S-84, p. 1072a):

> "I am going to ask you some questions, *Ed*, concerning an *incident* that occurred in Mahwah and one Vickie Zielinski." (Emphasis ours.)

The petitioner ("Ed") is not told of the brutal killing of this girl, etc., how she was bludgeoned to death, etc., but of an "incident", with the casualness of discussing a moving picture or television show. Furthermore, there is *no evidence* in the record, that the police previously apprised the petitioner of the crime.

Then, without warning petitioner of the charge or that he may remain silent, etc., the prosecutor cunningly led this young ex-marine who had just lost his job and spent two sleepless nights (one in custody) surrounded by a host of police officials without counsel, etc., down the road to doom.

A reading of the S-84 Exhibit, stenographic transcript of the so-called "confession", allegedly under oath, by leading questions and cross-examination, proves beyond question that the petitioner was, at least, at that time—*a defendant* (see below).

The caption of the transcript plainly reads:

"STATE OF NEW JERSEY,

vs.

EDGAR H. SMITH,

Defendant.*

CHARGE: MURDER

Office of the Bergen County Prosecutor
Courthouse, Hackensack, New Jersey
Wednesday, March 6, 1957—12:50 P. M.

Present:

1. Edgar H. Smith.
2. Fred C. Galda, First Assistant Prosecutor of Bergen County.
3. Juror, Louis M. Kalstad.**
4. Charles E. Smith, Chief of the Mahwah Police Department.
5. Harry Voss, Chief of the Ramsey Police Department.
6. Walter Spahr, Bergen County Detective.
7. Arthur J. Ehrenbeck, Official Stenographic Reporter."

• • •

The only mention that could even be construed as alluding to "voluntariness", would be casual inquiry of the prosecutor "are you willing to give a *voluntary* statement concerning *this incident?* (Emphasis ours.)

What incident? There is no proof of any "incident" or that the defendant was previously confronted by the facts of any incident, which in fact was a "gruesome homicide."†

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* NOTE: The designation "Defendant" and the CHARGE: MURDER (*supra*).

** NOTE also above-listing of presence of "juror"!

† The "incident", is subsequently at the trial, described by the prosecutor, in his *opening* to the jury: "This was a brutal, a savage, a sadistic killing" (p. 182a). Apropos of these prosecutor remarks, note the "confidence game" treatment given this defendant throughout the said "confession" and subsequent thereto.

Quite the contrary; defendant subsequently testified at his trial that he didn't know of the crime except what he heard or read in the newspapers.

No police official or prosecutor advised him of the murder, that they were asking him to confess; and only one statement in the confession that this was to be a "voluntary" statement concerning "an incident", *not a murder, or homicide mind you, but* just an incident!

Was this prosecutor so squeamish about mentioning "murder" or "killing"? He never once through the lengthy examination ever asked the petitioner if or how he killed the girl in question!

What "incident"? The fact that the petitioner was at the scene of the crime that night with the deceased in the sand-pit, a known lover's lane?

Is this a fair and proper foundation to query "the accused" to get him to confess a murder?

The trickery and cajoling and false sympathy extended to this "suspect-defendant" about to confess a "murder" is also portrayed by the following:

> "By the prosecutor: Before we start do you want some coffee or anything?
> Q. Do you like black coffee or regular coffee?
> Q. Do you like some cream in your coffee?"

Mind you, all this solicitude about a cup of coffee, but not one query whether the Petitioner would like to have a lawyer or counsel present. Also, this "solicitous" prosecutor did not advise the Petitioner that he had a constitutional right to remain silent and that what he said could be used against him.

Thus, in this casual innocuous way, begins the examination by a skilled prosecutor of a naive defendant, which brings this young man to the brink of his doom.

Asking defendant if he would make a "voluntary" statement leaves no argument to demonstrate that "voluntary" is but a conclusion and the prosecutor should have lawfully and properly asked the Petitioner if he would make a statement on his own, without counsel and with the full realization that what he said might be used against him. The prosecutor's responsibility to safe-guard the defendant's constitutional rights, became even greater when *he* chose "*to hold court*" in the inner sanctum of his offices, instead of in an open and public courtroom, where *the defendant* should have then been lawfully arraigned.

As Mr. Justice Douglas characterized in the *Spano* case (*supra*):

> "This is a kangaroo court procedure whereby the police produce the vital evidence in the form of a confession which is useful or necessary to obtain a conviction. They in effect deny him effective representation by counsel. This seems to me to be a flagrant violation of the principle announced in Powell v. Alabama (supra) that the right of counsel extends to the preparation for trial, as well as the trial itself. As Professor Chafee once said, 'A person accused of crime needs a lawyer right after his arrest probably more than any time.' Chafee, Documents on Fundamental Human Rights, Pamphlet 2 (1951-1952, P. S-41). In that event the '*secret trial*' in the police precincts '*effectively supplants the public trial guaranteed by the Bill of Rights*'." (emphasis ours)

In Powell v. Alabama, 287 U. S. 45:

> "The original constitution of New Jersey of 1776, article XVI contained a provision like that of a Penn charter to the effect that all criminals shall be permitted to the same privileges of counsel as their prosecutors."

New Jersey constitution has adopted English common law before the adoption of the Federal constitution.

Is there any question, that Petitioner was "accused of crime" after his "arrest" and in need of a lawyer prior to and during the inquisition (*supra*)?

In line with the above, it is urged that the confession obtained herein was not voluntary and was not the exercise of Petitioner's free will and that the common law dealing with physical coercion, which has now been construed to include psychological coercion, is not the sole standard to be employed prior to sending a defendant to his death, "and that there always remains the restraining and protective arm of the XIV Amendment to call upon the States to give an account of their stewardship of all persons and citizens, both Federal and State."

The Petitioner here was in every respect treated as *a defendant*, except the formality of being charged and arraigned for murder; which, of course was *so unnecessarily and unreasonably delayed* (*supra*) as would have accorded him the legal and constitutional protection, the police and prosecutor sought to avoid.

See *Bram* v. *U. S.*, 168 U. S. 532 and *Lisenba* v. *California*, 314 U. S. 219.

Taken together, the *Bram* and *Lisenba* cases hold that a coercive or compelled confession cannot be used to convict a defendant in any State or Federal court.

"The Sheriff's deputies set themselves up as a quasi-judicial tribunal and tried—and convicted him there and in so doing rendered a trial—before a trial court—and the Jury of Peers—a mere formality (here the prosecutor and police so acted).

"The aid of counsel in preparation would be farcical if the case could be foreclosed by preliminary investigation which would squeeze out conviction by means unconstitutional if used at the trial.

Cooley's Constitutional Limitations, 6th Edition;
Wood v. *U. S.*, 309 U. S. 227;
Vanty v. *Alabama*, 309 U. S. 629;
White v. *Texas*, 310 U. S. 530;
Lisenba v. *California* (*supra*);
Bram v. *U. S.* (*supra*).

"Provided that he is so prejudiced thereby as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice'. The determination depends upon all the circumstances of the case."

House v. *Mayo*, 324 U. S. 42, shows petitioner to have been "taken advantage of" to violate due process of law.

In *Glasser* v. *U. S.*, 314 U. S. 60:

"The right to have assistance of counsel is too fundamental to allow courts to indulge in nice calculations. As to the amount of prejudice arising from his denial, the Crooker case also refers to the Betts v. Brady case where the denial of counsel was not prejudicial. But it must be mentioned that this was not a capital case and the dissent in the Crooker case was reluctant and cautious so that the majority opinion not be extended to capital cases."

An admirable summary of the generally expressed judicial attitude towards these practices is set forth in the report "Lawless Enforcement of Law", by the Americal Journal of Police Science:

> "Holding incommunicado is objectionable because arbitrary—at the mere and unregulated pleasure of a police officer. The use of third degree is obnoxious because it is secret; because the prisoner is wholly unrepresented; because there is present no neutral impartial authority to determine questions between the police and the prisoner; because there is no limit to the range of the inquisition nor the pressure that might be put upon a prisoner".

We are mindful of the holding in the *Cicenia* v. *Lagay* (*supra*) case and *Crooker* v. *California* but we do not rely solely upon this claim but we urge an *accumulation of deprivation of the defendant's legal and constitutional rights.*

Although the said *Cicenia* case held that it did not mean to inflict any "constitutional compulsion" on the States nor limit its police powers, it stated that it depended upon the circumstances and that "fundamental fairness" was the test.

We submit that the within accumulation of deprivation of the defendant's rights does not meet the test of "fundamental fairness".

We do not come within said case but rather the cases of *Mallory* v. *U. S.*, *supra*, *Ashcraft* v. *Tennessee*, *supra* (and others), and the more recent case of *Spano* v. *New York*, *supra*, decided as recently as June 22nd, 1959. There, this Honorable Court held that it was not necessary to distinguish the *Crooker* v. *California*, *supra* case and the *Cicenia* v. *Lagay*, *supra* case on the ground that in those cases no indictment had been returned; for it finds "use of the confession obtained there inconsistent with the XIVth Amendment under tradational principles."

The Chief Justice, there, speaking for the Court, further held:

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly,

the actions of police in obtaining confessions have come under scrutiny in a long series of cases.*

These cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry in respect of the crime. The facts of no case recently in this court have quite approached the brutal beatings in Brown v. Miss., 297 U. S. 278 (1936), or the 36 consecutive hours of questioning present in Ashcraft v. Tenn., 322 U. S. 143 (1944). But as law enforcement officers became more responsible, and *the methods used to extract confessions more sophisticated*, our duty to enforce Federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made. Our judgment here is that, on all the facts, this conviction cannot stand" (emphasis ours).

Although the record does not disclose this, the petitioner was "obliged" to change from his street clothes to *prison-denims*; *this before* the confession! Psychologically, this new attire obviously conditioned the mind of petitioner for the confession. This reprehensible

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* E.g., *Ciccnia* v. *Lagay*, 357 U. S. 504; *Crooker* v. *California*, 357 U. S. 433; *Ashdown* v. *Utah*, 357 U. S. 426; *Payne* v. *Arkansas*, 356 U. S. 560; *Thomas* v. *Arizona*, 356 U. S. 390; *Fikes* v. *Alabama*, 352 U. S. 191; *Leyra* v. *Denno*, 347 U. S. 556; *Stein* v. *New York*, 346 U. S. 156; *Brown* v. *Allen*, 344 U. S. 443; *Stroble* v. *California*, 343 U. S. 181; *Gallegos* v. *Nebraska*, 342 U. S. 55; *Johnson* v. *Pennsylvania*, 340 U. S. 881; *Harris* v. *South Carolina*, 338 U. S. 68; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Watts* v. *Indiana*, 338 U. S. 49; *Lee* v. *Mississippi*, 322 U. S. 742; *Haley* v. *Ohio*, 332 U. S. 596; *Malinski* v. *New York*, 324 U. S. 401; *Lyons* v. *Oklahoma*, 322 U. S. 596; *Ashcraft* v. *Tennessee*, 322 U. S. 143; *Ward* v. *Texas*, 316 U. S. 547; *Lisenba* v. *California*, 314 U. S. 219; *Vernon* v. *Alabama*, 313 U. S. 547; *Lomax* v. *Texas*, 313 U. S. 544; *White* v. *Texas*, 310 U. S. 530; *Canty* v. *Alabama*, 309 U. S. 629; *Chambers* v. *Florida*, 309 U. S. 227; *Brown* v. *Mississippi*, 297 U. S. 278.

piece of business on the part of the police and or prosecutor is another "link in the chain" of shackling this boy's fundamental and constitutional rights.

Here, as in the *Spano* case (*supra*), "he was subjected to questioning not by a few men, but by many (15 named). All played some part" as this Honorable Court held, "and the effect of such massive official interrogation must have been felt" (here the record discloses "in excess of a dozen of police and prosecutor officials" (p. 540a); in fact, *twenty* (20)):

1. Prosecutor Calissi
2. 1st Assist. Pros. Galda
3. Chief of Ramsey Police Voss
4. Chief of Mahwah Police Smith
5. Dect. Capt. DeMarco
6. Dect. Chief Stewart
7. Mahwah Police Capt. Wickham
8. Mahwah Police Lt. Haight
9. Dect. O'Har
10. Dect. Sinatra
11. Dect. Graber
12. Dect. De Lisle
13. Dect. Spahr
14. Dect. Garabidian
15. Dect. Ridgeway
16. Ramsey Police Lt. Doremus
17. Investigator Nunno
18. Investigator Perrapato
19. County Medical Examiner, Dr. Gilady
20. Stenographer Ehrenbeck

There, the petitioner was questioned for virtually eight straight hours before he confessed after all-night fatigue. *Here*, the petitioner was questioned for virtually twenty (20) hours through the night and late into the next day before he "confessed".

Here, the "massive, official interrogation" began the night of March 5, 1957, by "in excess of a dozen police officials" (including the prosecutor) and continued throughout the night, culminating in the extended inquisition by the prosecutor the following day ending in the petitioner's confession the afternoon of March 6th (p. 593a). "The method" used by the prosecutor was "sophisticated", indeed.

As in the *Spano* case (*supra*) "in such circumstances slowly mounting fatigue does and is calculated to play its part".

Here, with the petitioner ill and no sleep the previous night, no sleep or rest the following night nor the following day (Smith's preliminary testimony, pp. 539a-542a) "slowly mounting fatigue" played its part. We must conclude "that Petitioner's will was overborn by official pressure, fatigue and 'confidence' falsely aroused." (See *Spano* v. *New York*, *supra*.)

Even though there was no evidence of physical coercion or psychological coercion, this Honorable Court stressed in the case of *Haley* v. *Ohio*, 332 U. S. 596 that:

> "the defendant's age and absence of counsel and the police working in relays over a period of 5 hours to override the defendant's judgment".

Mr. Justice Frankfurter, in said case, in a concurring opinion, pointedly stated:

> "it is suggested that Haley's guilt could easily have been established without the confession elicited by the sweating process of the night's interrogation. But this only affords one more proof that in guarding against misuse of the law enforcement process, the effective detection of crime and the prosecution of criminals, are furthered and not hampered."

And further at page 606:

> "'Conduct under duress involves choice'. Union Pacific R. Co. v. Public Service Commission, 248

U. S. 67, 70, and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint.

Unhappily, we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in severing a confession reach the coercive intensity that calls for the exclusion of a statement so secured. Of course, the police meant to exercise pressures upon Haley to make him talk. That was the very purpose of their procedure. In concluding that a statement is not voluntary which results from pressures, such as were exacted in this case to make a lad of fifteen talk when the Constitution gave him the right to keep silent, and when the situation was so contrived that appreciation of his rights, and thereby the means of asserting them were effectively withheld from him by the police. I do not believe I express a merely personal bias against such a procedure. Such a finding, I believe, reflects those fundamental notions of fairness and justice in the determination of guilt or innocence which lie embedded in the feeling of the American people, and are enshrined in the Due Process Clause of the Fourteenth Amendment. To remove the inducement to resort to such methods, this Court has repeatedly denied use of the fruits of illicit methods.

Accordingly, I think Haley's confession should have been excluded and the conviction based upon it should not stand."

In the case of *Malinski v. New York*, 324 U. S. 401, at page 404, it was stated as follows:

"If the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant. Ashcraft v. Tennessee, supra, p. 154. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. Lyons v. Oklahoma, 322 U. S. 596, 597."

In the case of *Lyons* v. *Oklahoma*, 322 U. S. 596, 597, in a footnote at page 597, it was stated:

> "Whether or not the other evidence in the record is sufficient to justify the general verdict of guilty, is not necessary to consider. The confession was introduced over defendant's objection. If such admission of this confession denied a Constitutional right to defendant, the error requires a reversal." Bram v. United States, 168 U. S. 532, 540-542 and cases cited.

In the case of *Watts* v. *Indiana*, 338 U. S. 49 at 53, in an Opinion by Mr. Justice Frankfurter, at page, 50, it was stated:

> "Thus, while the State Courts have the responsibility for securing the rudimentary requirements of a civilized order, in discharging that responsibility there hangs over them the reviewing power of this court."

And, at page 53 of the said opinion, it was further stated as follows:

> "A confession by which life becomes forfeit must be the expression of a free choice. A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questions under such circumstances is plainly the product of the suction process of interrogation, and therefore, the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his Constitutional right. To turn the detention of an accused into a process of wrenching

from him evidence which could not be extorted in open Court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.

This is so because it violates the underlying principle in our enforcement of the criminal law. Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end. See Ploscowe, The Development of Present Day Criminal Procedures in Europe and America. 48 Harv. L. Rev. 433, 457-458, 467-473 (1935). Under our system, society carries the burden of proving its charge against the accused, not out of his own mouth. It must establish its case, not by interrogation of the accused, even under judicial safeguards, but by evidence independently secured through skillful investigation. 'The law will not suffer a prisoner to be made the deluded instrument of his own conviction.' 2 Howkins, Pleas of the Crown, C. 46, Sec. 34 (8th Ed., 1824). The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a Magistrate, the right to assistance of counsel—the duty to advise an accused of his Constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands. Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system. It is the inquisitorial system, without its safeguards. Law triumphs when the natural impulses aroused by a shocking crime yield to the safeguards which our civilization has evolved for an administration of criminal justice at once rational and effective."

In *Galegos v. Nebraska*, 342 U. S. 55, it was stated:

"One of the senses in which the Courts use the word 'voluntary', a confession of incriminating tes-

> timony taken from a defendant without warning of his rights, is not voluntary. This is a constitutional question of due process."

In *Powell* v. *Alabama*, 287 U. S. 45, a failure to allow defendant counsel has been declared a denial of due process and that right accrues the moment he is "charged" with crime.

Reference is again made herein to the Footnote to Mr. Justice Douglas' Dissent in *Crooker* v. *California*, *supra*, at page 446 thereof, wherein it is stated that the Scot's view was recently stated by the Lord Justice General in *Chalmers* v. *H. M. Advocate*, 1954 Sess. Cas. 66, 78:

> "The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion has in their view centered upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, e.g., to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor, and to be brought before a Magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

As Mr. Justice Stewart so vividly described "this was not an arraignment in a court of law but an all-night investigation in a prosecutor's office, a police station and an automobile." (See *Spano* (*supra*)).

AND:

> "the absence of counsel when his confession was elicited was alone enough to render it inadmissible under the 14th amendment"

This prosecutor who was sworn to uphold the U. S. Constitution, as the constitution of the State of New Jersey, designed to protect its citizens, was more interested in extracting a "confession" than in upholding the law.

So that there be no question of the part played by the prosecutor, in collaboration with the police, the prosecutor who "secured" this confession, engineered the "investigation" and "inquisition" from start to finish; as Mr. Justice Warren said in the *Spano* case, "until the drama was played out."

In view of Mr. Justice Warren's observation in the *Spano* case, as to *Crooker* v. *California, supra, Cicenia* v. *Lagay, supra,* there is no appreciable difference, between one held under indictment for murder, or one held as "a defendant" for murder; "we find it unnecessary to reach that contention", said this Honorable Court.

As a matter of procedure, the evil is worse, if a person is held "in custody" under "arrest" for murder and the prosecutor, not for the purpose of further investigation of the suspect, but solely for the designed purpose of confession, holds the "suspect" who is now *de facto, a defendant,* without formal charge, without arraignment and without counsel.

If this be permitted, then the purposes of the U. S. Constitution could be circumvented by this "Kangaroo court procedure" (*supra*).

There is absolutely no evidence in the record to disclose that petitioner was advised of the charge against him, or how the crime was perpetrated; except, as noted, that he heard or read something of the tragedy in the newspaper.

The petitioner acknowledged, at the trial, that he read that "Vickie" was dead, from a newspaper the afternoon of March 5th (the following day), but not as to details of the murder or the extent of the injuries, etc. He concededly

didn't know nor was he advised of same at the time of the alleged "confession", and not until the following Easter Sunday, when he was in prison, did he learn of this "bludgeon slaying" (p. 671a).

On cross-examination, the prosecutor prodded the defendant about his knowledge of the crime from a newspaper account of the murder (pp. 722a-3a) that "her head was crushed with a rock", only gaining the admission from petitioner that he understood from the newspaper that she suffered a "head injury" but knew nothing about the details of the crime.

Of course, this gives us cause to ponder, that if this "fair-minded" prosecutor had only made known to the Petitioner prior to or at the time of his "confession", the extent and details of the crime, we would not now have a dubious "confession" to a crime of which the *petitioner concededly had no knowledge.*

A reading of Exhibit S-84, the so-called "confession", portrays beyond question an astounding lack of knowledge by this petitioner, of the essential details of the crime to which he purportedly "confessed"; excepting, of course, the incriminating admissions that "I must have been the one who really did it"; "something snapped, that I did it—but couldn't convince myself", etc.

Did what? Did the petitioner once in this "confession" say that he bludgeoned this girl with a baseball bat or crushed her head with a rock? Nothing of the kind. It is a most peculiar incriminating and yet exculpatory "confession".

Concededly, the petitioner was not told or advised by the police or prosecutor before the confession, of the cause of death.

The Prosecutor attempts to get around this fatal defect by "inferring" knowledge of the crime from Smith's

"admitting" on cross-examination at the trial, that he had read about the case in a newspaper. But even this belated "admission", hardly cures the lack of knowledge or advice as to the *actual crime at the time* of his "confession".

We cannot infer this—it was the duty of the prosecutor to advise him so that petitioner was fully aware of the crime and the charge. We cannot speculate or summarize that he knew from a newspaper or what he heard over the radio or from what somebody told him, that he was fully apprised of the charge, etc., against him.

> "The New Jersey State Supreme Court, on appeal erroneously held the jury had a right to conclude that defendant was fully cognizant of the cause of Victoria's death at the time he confessed."

We question—from what? The Court and prosecutor cannot put the cart before the horse. The petitioner should have been apprised of the crime, etc. before or at the time of the so-called confession and the "confession" itself discloses this failure and omission, by the prosecutor. Here there was a defect on both grounds. Even though the legal grounds of objection to the confessin was in doubt on the trial and upon appeal, which doubt was attributable to inadequacy of counsel, the State Supreme Court held:

> "The confession was treated on appeal as though its introduction had been opposed on every conceivable ground."

This case abounds with serious error from start to finish. From its inception, the prosecution with its design for "confession" and ending with the "design" for death, this conviction must crumble since it was built on an illegal foundation, continuing with the prejudicial and inflammatory trial and ending with a conviction not based upon fair and unbiased deliberation by jury but by pre-judged and prejudicial jury (as noted in the "motion for a new trial").

It is significant to note that in the course of questioning in the confession, the prosecutor was concerned about the voluntariness and mistreatment of the defense but, by doing so, he "agrees" that petitioner was indeed and, in fact, "in custody" at the time:

> "Q. While you were *in custody* by the police up at Mahwah police headquarters, did anybody mistreat you, etc.?"

This was quite a question to ask the petitioner with the chief of police of Mahwah practically sitting at his elbow in the "group of interrogators" in the prosecutor's office.

"In custody" certainly denotes a status of a person "under arrest" rather than a mere "suspect" who is free to go at any time.

It is highly significant and enlightening to note that this "big-hearted" prosecutor gloated over the fact that after the "confession" that he (petitioner) was taken by the said prosecutor to a restaurant for a "pretty good meal" and one of his (prosecutor's) cigars.

At page 775a of the Record:

> "*By the Prosecutor*:
>
> Q. And you had a pretty good meal, did you not? A. I think so.
>
> Q. What did you eat? A. I had fried lobster tails.
>
> Q. *You had fried lobster tails and you smoked one of my cigars, is that right?* A. Yes." (Emphasis ours.)

It is ironic to note and the record so discloses, that for twenty (20) hours (up to this point) the petitioner was starved, with little food, no sleep, no rest and suffered other hardships and indignities. The above makes one wonder was this a "reward" for the "confession" or was it treatment usually accorded a "murderer" in a brutal slaying!

Or with the confession ("death warrant") tucked "safely" under his belt, did the prosecutor, assume the guise of the "executioner", rendering the "condemned man" his *last meal?* Although the record does not disclose it, we understand that this "feast" was in the form of a "Roman Holiday", resplendent with the presence of the Press.

Certainly, this strange behavior and attitude of the prosecutor is damning indeed and comes within the practices condemned by this Honorable Court wherein the police and prosecutor, not by old-fashioned third degree, but by trickery, cajoling, undue influence and extending false sympathy and confidence, gain "confessions" of suspects in crime.

This strange behavior and attitude on the part of the prosecutor becomes even more obnoxious and to be condemned as a practice in *a capital crime of murder,* with the extreme penalty of death in the balance of Justice.

The said "admissions" (before the alleged "confession") were allegedly first made, not to the police, but to *two detectives assigned to the prosecutor's office,* after all-night and through-the-night continuous interrogation by the police (at 10:00 A. M. morning of March 5).

And strangely indeed, the petitioner supposedly and suddenly "broke out crying" after he was merely asked the question:

"What did the girl do to you?" (p. 519a)

He said: "She hit me."

I asked him the question, "where did she hit you?"

He answered, "in the face"; and as he said that "he broke out crying."

"There was a period of time about two or three minutes and he asked for a drink of water and a cigarette. We gave him a drink of water and a cigarette and he said at that

time that the would like to speak to a priest. He asked for a certain priest that he knew in Don Bosco High School.

"When he seemed a little more composed he told us, etc." (p. 519a)

Then continues the recitation about meeting the girl, etc. (*supra*).

Although he is supposed to have asked to see a priest, it dosen't appear from the record that he even waited to see the priest, but, almost immediately (lapse of 23 minutes) he made these "incriminating admissions" about being with the deceased the night of the crime at the scene of the crime (sand-pit) and hitting her with his first (p. 519a).

The alleged "admission" to the prosecutor's office strangely stops at that point.

We next hear of a confession (S-84) to the prosecutor almost three hours later, wherein the petitioner "confesses" that he "did it" (Ex. S-84).

In the intervening period, besides a priest, the petitioner was supposed to have seen *three* (3) *doctors*, called by the prosecutor (p. 773a).

The petitioner, subsequently and at the trial, recanted the "confession" (S-84 in evidence), and stated he "made up" and "lied" in the statement; and also he lied to the said three doctors (p. 774a).

It is strange, indeed, that this prosecutor would call a *priest and three doctors* to see this petitioner *but not one lawyer or friend or relative*. We understand that even the petitioner's wife, who was standing by to call a lawyer, was kept "at bay" and not permitted to see her husband or offer any aid including legal counsel.

This was a "one-man show" (the prosecutor's) until the "drama was played out" (*infra*).

"What is true of the trial is true of the preparation for trial and the period commencing with the arrest of the accused, no matter how well educated and how well trained in the law an accused may be. He is sorely in need of legal advice once he is arrested for an offense that may exact his life. The innocent as well as the guilty may be caught in a web of circumstantial evidence that is difficult to break. A man may be guilty of indiscretions but not of a crime."

The need of a lawyer in a pre-trial investigation, if the constitutional rights of the accused are to be observed, was so upheld by Mr. Justice Black, who added:

> "The presence of legal counsel or any person who is not an executive officer bent on enforcing the law provided still another protection to the witness. Behind closed doors he can be coerced, tricked or confused by officers into making statements which may be untrue or hide the truth by creating misleading impressions. While the witness is in custody of the interrogators, he is subject to their controlled will. Nothing would be better calculated to prevent misuse of official power in dealing with a witness or suspect than scrutiny of his lawyer or friends or even disinterested by-standers."

"The demands of our civilization expressed in the due process clause require the accused who warrants a counsel to have one at any time after the moment of arrest" (*In re Groban*, 352 U. S. 330).

As this Honorable Court observed in the said *Spano* case (*supra*):

> "The drama was now played out, with the final admissions obtained—"

As here, the "final admissions", were obtained the afternoon of March 6, almost twenty (20) hours after the drama began, the night of March 5, when petitioner was taken from his bed in his trailer home (from his wife and child), stripped of his clothing, photographed, held incommunicado, without counsel, without arraignment, etc.

In *Mallory* v. *U. S.* (354 U. S. 449), Mr. Justice Frankfurter, speaking for the court, held:

> "An arrested person may be 'booked' by the police, but he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.
>
> The requirement that the arraignment be 'without unnecessary delay' is a compendious restatement without substitute change of several prior specific Federal Statutory provisions. Nearly all states have similar enactments." (As Rule 5(a) of the Federal Rules of Criminal Procedure)

The New Jersey Revised Statutes so provide (Rule 3:2-3 of the Rules of Criminal Procedure):

> "Appearance. An officer making an arrest under a warrant issued upon a complaint shall take the arrested person, without unnecessary delay, before the court or magistrate named in the warrant. A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available magistrate and a complaint shall be filed forthwith and a warrant issued thereon. A preliminary hearing before the magistrate shall be held forthwith.
>
> Preliminary Hearing. The magistrate shall inform the defendant of the complaint against him, of his right to retain counsel or, if indigent, of the privilege of having counsel assigned, and of his right to have a preliminary examination. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel. He shall also inform the defendant of his right to make a statement not under oath as to the charge against him, that he is not required to make such a statement and that any statement made by him may be used against him. If the offense charged may be tried by the magistrate upon waiver of indictment and trial by jury, the magistrate shall so inform the defendant. All waiv-

ers of indictment and trial by jury shall be in writing, signed by the defendant, and shall be filed and entered on the docket."

This Honorable Court further held in the *Mallory* case, *strikingly parallel to the instant case*:

"The circumstances of this case preclude a holding that arraignment was without 'unnecessary delay'. Petitioner was arrested in the early afternoon and was detained at headquarters within the vicinity of numerous committing magistrates, even though the police had ample evidence from other sources than the petitioner for regarding the petitioner as a chief suspect. They first questioned him for approximately ½ hour. When this inquiry of a 19 year-old lad of limited intelligence produced no confession, the police asked him to submit to a lie detector test. He was not told of his right to counsel or to a preliminary examination before a Magistrate, nor was he warned that he might keep silent, and that any statements made by him may be used against him.'

Not only had he confessed, when any judicial caution had lost its purpose, when the police arraigned him.

You cannot sanction this extended delay, resulting in confession without subordinating the general rule of prompt arraignment to the discretion of arresting officers in finding exceptional circumstances for its disregard. In every case, when the police resort to interrogation of a person and secure a confession, they may well claim that they were merely trying to check on the information given by him against such a claim and the evil potentialities of the practice for which it is urged stands Rule 5A as a barrier (note—Rule 5A of the Federal Rules of Criminal Procedure is almost identical with the New Jersey revised statutes as to prompt arraignment without unnecessary delay, etc.).

Nor is there any escape from the constraint laid to the police by that rule in the two suspects in-

> volved in the same crime. Presumably, whenever the police arrest, they arrest on 'probable cause.' It is not the function of the police to arrest as it were, at large, and to use an interrogating process to determine when they should be charged before a committing magistrate on 'probable cause.'
>
> Duty enjoined upon arresting officers to arraign without 'unnecessary delay' indicates that the command does not call for mechanical or autocratic obedience. Circumstances may justify a brief delay between arrest and arraignment, as, for instance, where the story volunteered by the accused is susceptible to quick verification through third parties. *But the delay must not be of a nature to give opportunity for the extraction of a confession.*" (See also McNabb v. U. S., 318 U. S. 332)

To prove the "voluntariness", the prosecutor ingeniously "sandwiches in "between the first "admission" to the police and the "confession" to the prosecutor, a priest's visit, supposedly called for by the defendant.

It is inconceivable that the petitioner would ask for a priest and not a lawyer; and the prosecutor's officers readily "obliged".

This is strangely parallel to the *Spano* case, *supra*, when the police used a "childhood friend" police officer "to overcome petitioner's will" (as the Court indicated).

Here, the police used a priest to accomplish their purpose. (Incidentally, "the priest" did not testify at petitioner's trial.)

It may be blasphemous to characterize the priest's alleged visit, as does this Honorable Court of the visit of the "friendly officer" (in the *Spano* case) observed:

> "Petitioner was apparently unaware of John Gay's famous couplet:
>
> "An open foe may prove a curse,
> But a pretended friend is worse."

This Honorable Court concluded there (as it should here):

> "that petitioner's will was 'overborn by official pressure, fatigue and sympathy falsely aroused. The police were not therefore merely trying to solve a crime, or even absolve a suspect — (compare Crooker v. Calif., supra and Cicenia v. Lagay, supra) they were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these." Malinski v. New York, 324 U. S. 401. Accordingly we hold that petitioner's conviction cannot stand under the 14th amendment" (See Spano (supra)).

Re: Preliminary Hearing on "Confession"

Unfortunately, the trial attorney who had admitted to crucial mistakes, particularly as to the "time of death" (App. 58a; p. 179a), has committed a most serious error in failing to conduct a full hearing, as the law requires, on the "voluntariness" of the confession.

The defense called only the defendant in a preliminary hearing for "cursory" testimony, while the people called one witness, a "juror" (member of the current jury panel) (p. 542a); incidentally, this "juror" was strangely present at every stage of the proceedings, including the investigation, interrogation and "confession"!

This "juror" was apparently a *member of the prospective trial jury panel*. Although, not on the trial jury itself, it seems highly improper and prejudicial to a fair and impartial trial, to have such a person directly or indirectly associated in the case, even before it comes to trial. We cannot surmise or speculate the extent that this "juror" mingled and associated with the other members of the

trial jury panel from which this trial jury was chosen and the extent of dissemination of information or intimate and first-hand knowledge of the crime and the petitioner in connection therewith, in advance of the trial. The fact remains, and is of record, that this "juror" was present and participated throughout the investigation (at the scene of the crime and elsewhere), at the interrogation and subsequent confession (Exh. S-84, 542a, p. 528a, p. 516a (see also, App. p. 105a)). However, it did appear at the motion for a new trial, to show prejudgment and prejudice of at least one juror, that a trial juror, sequestered during the trial at a hotel, allegedly told his wife, during the course of the trial, and before the case was submitted to the jury, that "the Smith family 'were lying in their teeth to save the boy'" and "that her husband (the juror) said the boy was guilty and they (the jury) were going to hang him for it."

The record also discloses another strange appearance in this circumstance by the presence of a member of the Grand Jury Panel, at least, at the proceeding in the prosecutor's office prior to the "confession".

By the prosecutor (of Capt. DeMarco of the prosecutor's office staff) at page 484a:

> "Q. Was there anybody in the office during the morning that was not connected with the Prosecutor's office? A. Yes, sir, there was a member of the —whether it was the current Grand Jury I don't know—but there was a member of the Grand Jury staff."

This apparent fact (*supra*) was not further questioned, explained or controverted. (See also Pt. II as to "denial of fair and impartial trial".)

The defendant testified briefly, that he was taken into custody 11:30 P. M. the night of March 5 (p. 539a) and that from then until the statement was taken, he had not slept; that during the night and up until his confession, the jury

afternoon, "in excess of a dozen" police or prosecutor's officials had continually questioned him (p. 540a).

That he was questioned indoors and outdoors, through a freezing cold night, scantily clothed in a shirt (prosecutor let him "borrow" an overcoat) (p. 541a.)

That he was taken to the medical examiner's office for a physical examination the next morning and that previously, he was at a police captain's house.

That he was "shivering cold" and he had previously been ill (p. 544a) for four days previous and that for a period of twenty-four hours, he had eaten but 2 eggs and had 2 cups of coffee, all told (p. 542a).

The prosecutor asked no questions on cross-examination and called but one witness in this "preliminary examination."

This witness apparently aided the defense, when he testified:

By the prosecutor:

> "Q. Was he asked whether or not he would give a voluntary statement? A. He was asked.
> Q. What did he say? A. He said "Let me think."
> Q. And after he said "let me think", what did he say? A. He said "let's put it that way".
> Q. And was he asked whether or not he would give a statement under oath? A. Yes.
> Q. What did he say? A. That I don't recall." (p. 544a)

This bit of testimony seems to throw serious doubt upon the so-called "voluntary" aspect of the defendant's statement. This "juror" seems to dispute the testimony of the prosecutor's officers as to the so-called "voluntary" aspect of the statement.

Although the prosecutor did not call the police officers as witnesses in the brief preliminary hearing concerning

the voluntariness of the confession, he seemed to anticipate the defense and abortively attempted to bolster the "voluntariness" of the confession by inquiring of the police officers, in advance, in their direct testimony whether the confession was "voluntary". Of course, this was but a conclusion and an opinion ill-placed in the record of the case.

Re: The Furtive and Unlawful Visit by the Prosecutor to Gain "Acknowledgment" of Confession

Heaping evil upon evil, the prosecutor's emissary stealthily (and unknown to defendant's then recently retained counsel and of record) "stole" into the prison, to prevail upon petitioner to sign the so-called "confession" but upon his refusal tricked and cajoled him into "acknowledging" its accuracy, which abortively served its purpose. (p. 520a).

It is most significant to note that under New Jersey law, where the defendant does not sign a confession, he must aver to the accuracy or correctness of a question and answer statement, to be admissible in evidence as a confession (*infra*).

If it were not for this unauthorized and highly improper visit by the prosecutor's officer to petitioner at the prison, *after arraignment and with counsel representing him*, five (5) *days after his arraignment*, the foundation for the admission of the confession could not have been accomplished. (Also, *after defendant's indictment of March 8th.*)

The prosecutor's detective acting for the prosecutor discloses (p. 520a of the Record) that after identifying (Ex. S-84) the said confession, he testified as follows: (detective attached to the prosecutor's office)

(p. 521a)

By the prosecutor:

"Q. *On March 11th*, did you take that statement and give it to Smith? A. I took this statement (S-

84) and some copies of the statement over to the jail at about 10 o'clock in the morning of March 11th and I asked Smith to read it.

Q. Did Smith read it? A. He did read it, sir.

Q. How long did it take to read it? A. About 35 minutes.

Q. And subsequently to having read it, what did he say, if anything? A. He said he would not sign the statement. I asked him why and he said that his lawyer told him not to. I asked him if the statement was accurate and he said 'yes, it is accurate'. He commented upon how accurate it was and it was amazing that the court stenographer could take down with such accuracy such a statement.

Q. What time did the interview or at least the conversation together with the reading of the statement take or when did it terminate? A. It terminated at 11 o'clock A. M."

On cross-examination, (p. 521a of defense counsel)

"Q: Who was his lawyer then? A. I think Mr. Gandielle.

Q. I was not his lawyer, was I? A. I don't think so.

Mr. Selzer: No further questions."

It is enlightening to note, that the trial attorney was more concerned with "his status" than that of the defendant: that he was not the lawyer who advised the defendant against signing same. Apparently, missing a most serious point in the case, that this unauthorized, improper and unlawful visit (after arraignment and representation by counsel) *and tricking the petitioner into "acknowledging" the accuracy of the statement was as damaging as the unlawful taking of the original confession.*

It is also significant to note that the prosecutor's representative was fully aware, at that time, that the defendant was then represented by counsel and although he was told by petitioner that his lawyer advised him not to sign any statements, the prosecutor's officer persisted and tricked

and cajoled him into "just reading it", that he obtained an acknowledgment as to its accuracy or, in effect, its "truthfullness" (p. 520a). Without this averment by petitioner as to its accuracy—after his refusing to sign same—*the sole evidence—the confession* Ex. S-84, could not have concededly been admitted into evidence and the prosecutor's (People's) case would have indeed collapsed! The prosecutor was fully aware and cognizant of this vital link. On appeal, the prosecutor in seeking to uphold this "confession", argued:

> "The law is clear that a statement made by a defendant need not be signed by him to render the same admissible. All that is required is that the statement be read over to or by *the accused* and that it be signed or *otherwise admitted by him to be correct*".

> NOTE: The prosecutor here blandly argues that the statement (confession) was made by "a defendant" or "the accused"!

(See also ruling by the Court on admission into evidence of the confession—Exhibit S-84 (p. 549a):

> "and a confession, though unsigned, if acknowledged, read and approved by the confessor, is admissible in evidence as an entity".

In *Asheraft* v. *Tennessee* (*supra*): "The uncontradicted evidence (inter alia) that Asheraft had been held incommunicado for 36 hours, during which time without sleep or rest he had been interrogated by relays of officers and investigators show a situation inherently coercive." (Solely and alone, on the basis of this confession, he had been convicted, as here).

State and Federal Courts' text book writers, legal commentators and government commissions consistently have applied the name "inquisition" to prolonged examinations of suspect's conduct, as was the examination of Asheraft.

Chambers v. Florida, 309 U. S. 227;
Brain v. U. S. (*supra*).

Mr. Justice Black, speaking for the majority of the Court stated:

> "It is inconceivable that any Court of Justice in the land, conducted as our Courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for 36 hours without rest or sleep in an effort to extract a 'voluntary' confession, nor can we consistently, with constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open Court."

In this connection, it is highly significant to note that all during said lengthy and unreasonable detention of petitioner, for almost twenty (20) hours, there was at all times available a magistrate before whom Smith could have been arraigned (as so noted in the *Mallory* case (*supra*)).

It was only after the unlawful detention and restraint that the petitioner was brought to the prosecutor's office *without being advised* (as above noted) "*of his right to counsel or to a preliminary examination before a magistrate or that he might be kept silent and that any statement made by him might be used against him*", that the so-called "confession" was obtained.

Also, it should be mentioned that consistent with the petitioner's protests of innocence, he thereafter voluntarily submitted to a "truth-serum" test conducted under the supervision of the State authorities and the Court, *but* the records of said tests and a tape-recording of same were never filed or made known to the petitioner or his trial counsel although repeated demands to this date, had been made for same. The said demands were fortified by a recent motion on June 12, 1959, in the Bergen County Court, New Jersey, which was summarily denied.

Of course, present counsel is cognizant of the fact that this "truth-serum" examination would not be "evidentiary" but nevertheless would be "in the interest of justice" and significant and fortifying as to the defendant's claims and protests of innocence.

* * *

For the sake of brevity, in this petition, we will briefly, the remaining points relied upon.

* * *

II

As to the denial of a fair and impartial trial, guaranteed by the Bill of Rights and the XIV Amendment to the United States Constitution.

It is highly significant to note *that the Trial Judge's charge was the most vicious and brutal summary of prejudice and hostility imaginable and not within counsel's scope of knowledge and experience of over twenty years at the Criminal Bar* and together with an accumulation of other enumerated prejudicial errors and failures was a departure from the accepted and usual course of judicial proceedings and in violation of the XIVth Amendment to the United States Constitution.

This Court's attention is most respectfully called to the Judge's charge, which appears in Volume III (pp. 944a-968a) wherein the Trial Judge, himself a father with a fifteen year old girl, overcome emotionally during the trial (calling for his own recesses to compose himself) finally delivered a charge to the jury what amounted to a scathing denunciation in the case and erroneous and misleading enunciation and theory of the evidence in the case, *in reviewing the People's case; and not saying one word about the defense*, as to "voluntariness" of the confession, degree of "temporary insanity" or whether the alleged crime could have been committed by some other person, as petitioner

contended. Over and over again the Trial Judge (and unfortunately the cold print cannot show such emotion) spoke of the "braining", "decerebration", "skull-crushing" "blood-stained area", "blood-drenched rocks", "blood-marked baseball bat", "death-dealing blows", "body torn, crushed, mutilated, exposed", "face bashed", "brains separated from the head", etc. in the most gruesome and word-sordid portrayal manner imaginable, far from what we would expect from a fair and impartial Trial Judge, summarizing fairly and impartially both sides of the case and the applicable law for the State and the defense:

23 Corpus Juris, Secundum, Sec. 960:

> "The object of criminal trial is to mete out justice. Every accused personally is entitled to a fair and impartial trial and the presiding judge must so control the trial as to preserve this right as well as all other rights of the accused and the prosecution.
>
> Under constitutional or statutory guarantees thereon, every person accused of a crime is entitled to a fair and impartial trial in which the legal rights of such accused person are safeguarded, protected and respected; that is a trial on the facts in accordance with the law and the evidence, with applicability to defend before an unbiased tribunal in an atmosphere of judicial calm and free from harmful error and any extraneous influence that might be to his prejudice.
>
> This right of a fair trial exists and must be upheld regardless of accused's actual or apparent guilt or the court's belief therein; regardless of the nature of the crime, the existence of public sentiment and regard thereto.
>
> The trial court must uphold and enforce accused's fundamental rights."

The said Trial Judge, in his charge strongly supported the theory of the People's case as a "*sex-killing*" (but not supported by the evidence) that "the defendant con-

tended with her—struggled with her"; "as he pursued the victim who sought relief from his clutches", etc. *but* where was the jury when the judge remarked to the prosecutor, as follows (at p. 976a):

The prosecutor excepted to the Court's charge as follows (but this debate in the absence of the jury, which had already retired for deliberation):

By the Prosecutor:

"Mr. Calissi: Yes. If the Court please, the State excepts to that portion of the charge wherein the Court failed to explain to the jury the felony murder, that is, that part of 2A:113-1 which says, 'If any person, in commiting or attempting to commit arson, burglary, kidnapping, rape, robbery sodomy or any unlawful act against the peace of this state,' and so forth.

The State contends that there was sufficient evidence in this particular case and I am referring to the biting of the breast, the condition of the girl's clothing, to indicate that there was evidence at least to go to the jury of a felony murder.

The Court: Under what felony?

Mr. Calissi: Rape.

The Court: Rape?

Mr. Calissi: Attempted.

The Court: With your testimony that the girl from the waist down was virginal, clean and pure, her pants were spotless, her belt was untouched?

Mr. Calissi: Yes.

The Court: There wasn't sufficient evidence, or any evidence on which I could let this go to the jury on a felony rape.

Mr. Calissi: All right that is the Court's contention. I believe it is my duty as Prosecutor to contend for the State that attempted rape is sufficient for felony murder.

The Court: Let me say I gave that consideration and say for the record I found no evidence to support an attempted rape under the State's evidence and

therefore, sent it to (1610) the jury solely on an act the consequences of which may be bloodshed" (pp. 975a-976a).

The prosecutor and the Judge apparently blandly "*abandoned*" their theories of a "sex-murder"; *but all this not in the presence of the jury and the jury not brought back for further instruction.* (The jury already retired, as above noted but with prejudicial and inflammatory words of the prosecutor and the judge concerning a "sex-murder" etc. ringing in their ears.)

All this colloquy, *after* the jury was retired for deliberation *and not* recalled for further instruction!

The Trial Court further added to the defendant's unlawful conviction and deprivation of his fundamental rights by failing to submit to the trial jury all possible degrees of homicide (under a common-law indictment) including "Manslaughter". The jury was but given a choice of Murder in the first or second degrees.

Furthermore, two large blood-smeared rocks (12 and 25 lbs.) were introduced into evidence at petitioner's trial by the prosecution, although concededly not connected with the defendant and also concededly (by the State's own expert) not "handled" previously by any person, nowise this defendant. That this was improperly received and highly prejudicial and inflammatory needs no further note (p. 907a).

The Court's charge and prosecutor's summation were highly prejudicial and inflammatory, prompting a verdict not based on temperate discussion and clear convictions, but the direct product of bias and prejudice and "judicial coercion".

For example, the prosecutor told this jury (without objection) "*The dirtiest and foulest trick that was ever pulled by a defendant was pulled when it named his friend as the person to whom we should point the finger and say that he murdered Victoria Zielinski*". (Italics ours.)

Although sympathy and prejudice have no place in a criminal trial, especially a capital case, the prosecutor went on:

> "He talked about sympathy. Sympathy should go to Hommell and his family. What a disgraceful thing to have to cope with, a friend pointing his finger at you and saying to you, 'You committed this crime' ".

The jury was, no doubt, further influenced by highly prejudicial and inflammatory and improperly received color-slides and much enlarged colored photographs (16 x 20) of the scene of the crime and viewing the gruesome picturization of injuries and wounds to the deceased (skull crushed), depicting the murder scene and the body with a flaming blood-red color, although at least twelve hours had elapsed from "the time of death" and the blood had, no doubt, coagulated and changed to a more subdued color.

These enlarged color photographs goringly depicted the crushed, decerebrated skull with oozing blood; with the separated brains lying on the ground, etc. *These were objected to as not evidential and highly prejudicial* (p 319a). (These gruesome color enlargements were not reproduced in the appeal record due to the prohibitive costs).

Any logical relevance of such exhibits was overwhelmed by their inherently prejudicial qualities, and should have not been admitted.

These most gruesome and blood-curdling photographs were continuously on display before the jury throughout the entire trial.

At the trial, although in the prosecutor's possession, the death certificate fixing the "time of death" at about "10 to 11 P. M." was never introduced; the time element was a vital factor in the case and an essential element of the crime since *the defendant was concededly not at the alleged scene of the crime aft[illegible] 9-9:30 P. M.* (according to

the so-called "confession" and his testimony at the trial not refuted) *said death was concededly* instantaneous.

Facts pertaining to the prime suspect, one Don Hommell concerning his claimed "alibi" and the laboratory examination of his clothing worn the night of the crime, etc. were undoubtedly in the prosecutor possession but never presented during the trial or made available to the defense.

The autopsy report now appears to conflict with the trial testimony as to "the cause of death".

The autopsy report (not produced at the trial) attributed the cause of death to injuries due to a rock or stone conflicts with the theory of the prosecutor's case that the deceased met her death at the hands of a baseball bat; and the blood-smeared rocks also introduced into evidence against the petitioner, were concededly *not* handled by any person (p. 607a).

III

As to the petitioner having had inadequate defense representation and presentation (Point III) (to be read together with Point II).

Although present counsel is reluctant to criticize the "inadequacy" of the trial attorney, it is of such serious import that such scruples must be cast aside in this capital case and this Honorable Court must be made cognizant of the serious inadequacy of the presentation of defense herein and the inadequate representation of petitioner, which should not be visited upon and to the prejudice of the petitioner.

The following serious errors and failures of defense were committed:

1. Failure to move for a change of venue from the said county which was highly inflamed and prejudiced by this killing.

2. Although counsel objected to the "voluntariness" of the so-called "confession" he failed to request and the Court failed to conduct a required full hearing as to the facts and circumstances surrounding the obtaining of said alleged "confession".

3. That if this was to be construed as a "confession" wherein the petitioner claimed his mind "went blank" and "somebody pulled the switch", etc., then a defense of a *degree of "temporary insanity"* should have been asserted and presented to the Court and Jury. *There was utter failure of this crucial defense.*

4. The petitioner in his so-called "confession" "couldn't account" or even "remember" essential facts so necessary to prove "premeditated and deliberate murder" (See Exh. S-84).

5. Defendant-petitioner testified in his own behalf at the trial and denied the so-called "confession" and implicated another as a "prime suspect" in the case; but these conflicts were not reconciled.

6. Although the "confession" implied a degree of guilt less than murder possibly manslaughter (a crime without motive and or intent to kill), the case was presented to the Jury solely in the degrees of Murder first and second degrees, *and no suggestion of any degree of manslaughter, as a lesser crime.*

7. Although the District Attorney in his opening and throughout the theme of his entire people's case suggested a "sex-murder", a "felony-murder" (rape or attempted rape) *there was no evidence of same* nor could same be deduced from the petitioner's alleged confession, the only evidence in the people's case (p. 976a).

The Court ruled out felony-murder (rape) *but the Jury had already retired,* with this prejudiced misconception ringing in their ears.

Trial counsel and the Court utterly failed to have the jury recalled for further instructions on this most crucial and vital point in the case.

The exceptions to the jury charge were made in the absence of the jury which was intended to rectify error of the Trial Judge's charge (pp. 969a-976a).

Although trial counsel did not particularly so except, he nevertheless made a general exception to the entire Court's charge (p. 969a).

8. A serious question arose and still persists as to the "time of death" since the Medical Examiner fixed the time of death as of 12 Midnight, give or take an hour and that the death certificate fixed same "about 10 to 11 P.M." that night. (Subsequently, after trial, it was learned that the death certificate was available and so fixed the time of death). (*This important death certificate was never produced as evidence at the trial*). It is submitted that petitioner was nowhere near the scene of the crime's so-called "sand-pit" after 9 P. M., although death was concededly instantaneous and immediate.

Trial counsel, to this day, admits his serious and grievous error in that he failed to inquire of the Medical Examiner if the time of death could have been as early as 9:00 or 9:30 P. M. (App. pp. 40a, 41a).

At the motion for the new trial said trial counsel testified and practically "broke down" to admitting this serious error and failure and or neglect which could have been the turning point in the case and possibly resulted in another jury verdict (App. pp. 179a-182a).

At the motion for a new trial, the trial attorney made a most damaging admission concerning his failure and neglect to ask a crucial question of the medical examiner as to the time of death.

The trial attorney plagued by this failure and neglect *after the trial* and before a motion for a new trial, based upon newly discovered evidence, testified (App. p. 37a):

> "The Witness: I asked Dr. Gilady (medical examiner) whether or not he could say, in his opinion, that Victoria Z. had been killed as early as 9 o'clock on the night of March 4th. Dr. Gilady said he would not discuss the matter with me at all unless and until either the Court or the prosecutor told him he could do so—"

and, on re-cross examination by Mr. Calissi (prosecutor at page 39a):

> "Mr. Selser: Did you or did you not cross examine Dr. Gilady during the course of the trial?
> A. Yes sir, I did.
> Q. Is there any reason at all why you could not have asked him the exact question during the course of the trial that you asked him two weeks ago? A. There is but one reason, Mr. Calissi, I didn't think to ask the exact question.
> Q. So you had— A. I thought the record clearly indicated that this girl could not have been killed earlier than 11 o'clock. I thought that was in the testimony—"

Redirect examination by Mr. White (a defense attorney):

> "Mr. Selser: You were asked by the prosecutor if you had any particular reason for not asking that question and you said yes. Was there any particular reason?
>
> Mr Calissi: For what?
>
> Mr. White: Not asking the question of Dr Gilady with respect to whether or not the crime was committed about 9 o'clock.
>
> A. The reason is that *I am not smart enough to have thought of it.*" (Emphasis ours.)

At the conclusion of the hearing on the motion for the new trial, App. p. 179a (by the trial attorney):

> "Mr. Selser: I am grateful to your Honor for giving me the right to address myself to your Honor on the subject of Dr. Gilady's testimony which was a part of my petition for a new trial.
>
> Your Honor of course knows that under subpoena I cannot compel a physician to give opinion testimony.
>
> Your Honor recalls very well that Dr. Gilady testified that the girl was dead in his judgment twelve hours, give or take an hour.
>
> His autopsy was done between 12:30 and 1:00 o'clock of the afternoon of the 5th of March. That, if his testimony were left right there, would have placed the time of death twelve hours before 12:30 o'clock which would have made it 12:30 o'clock in the morning of the 5th. Give or take an hour would have moved it backward to 11:30 o'clock on the 4th. This was the State's testimony and had I let it be there without cross-examination, I would assume that there could have been no verdict against Smith because there was no other testimony (270) anywhere in the record fixing time of death.
>
> Under cross-examination I pursued the subject with Dr. Gilady and he said that she might have died earlier than 11:00 o'clock but at no time was he asked how much earlier than 11:00 o'clock and when the State on redirect went after Dr. Gilady trying to fix an earlier period of time, Dr. Gilady finally summed up his testimony and said, 'It is my opinion she was dead twelve hours, give or take an hour.'
>
> I have set forth in my testimony before the Court and in the petition that I asked Dr. Gilady the question point-blank as to whether or not this girl could have been killed as early as 9:30 o'clock in the evening of the 4th of March. That in my judgment is the latest Smith could have been in the area where her body was found. Dr. Gilady said he cannot and would not discuss this with me unless and until he

had an order of the Court or a directive from the prosecutor because he did this as County Medical Examiner and without this he would not discuss the subject with me.

Now, it is of tremendous importance in my (271) judgment and the Supreme Court apparently went along with the thought that your Honor expressed that this was an attack upon the credibility of the State's proofs.

It is not so, sir, because the State proved conclusively by its evidence that Smith could not have killed this girl unless the death occurred as early as 9:30 because your Honor will remember that it was a few minutes after 9:30 that he picked up Gilroy at Gilroy's home and this witness for the State testified that he was there after continuously being in the presence of Smith until he delivered Smith shortly after 10:00 o'clock at the home of the mother-in-law in Ridgewood, and there is ample proof that thereafter Smith was continuously in Ridgewood. There is no contradiction of the fact.

Now, sir, this, in my judgment, was of tremendous consequence and leaves in my mind the very sincere thought that there is not proof sufficient to have this boy forfeit his life.

I realize, of course, that there are many circumstances against the boy's defenses (272). There are many circumstances which point to a suspicion but the suspicion, sir, is not enough in the light of the testimony presently before us as to the time of the killing and certainly it should have amply been amplified by the testimony of Dr. Gilady. If Dr. Gilady testified before this Court that she could have died as early as 9:30, then I don't think I should feel so badly about the execution of this boy, but I can't see it, sir. I can't see it. It isn't possible that in this free democratic country the life of a lad could be taken where doubt exist as they must exist in this case.

Now I have heard all kinds of contradictory stories from many, many witnesses, sir. The greater

difficulty that ever existed was in getting people to talk with us, all the way through the preparation of the case, the trial of the case in the proceedings which thereafter occurred. I feel very keenly, sir, that the record in this case as it stands today is not such a record as justifies the destruction of this boy's life. I base it more than anything upon this lack in the time of death, this lack of proof.

(273) I certainly and strongly feel * * * the boy tells me, insists today even in the presence of God, practically, that he did not kill the girl.

The confession, as it was called by your Honor and by the Supreme Court, does not confess it."

IV

As to the petitioner's unlawful conviction there was further denial of due process and failure of a submission to the Jury of all possible degrees of homicide.

The record in the case is replete with confusion as to the indictment, prosecution and submission to the jury as to the degrees of homicide and possible verdicts thereunder.

The prosecutor contended this was a "sex-murder", "felony (rape) murder"; the Court thought otherwise but submitted to the jury only two degrees of murder, "*forgetting*" *entirely* "*Manslaughter*" which could have been deduced and justified from the evidence rather than premeditated and deliberate murder (pp. 976a; 956a).

The crime concededly was not committed by any prearrangement or "design for killing" so vitally necessary in a "Murder" conviction in the first or second degrees.

The motion for a new trial: based upon newly discovered evidence claiming alleged "perjury" committed by a "prime suspect", one Don Hommell who had been "involved" and placed at the scene of the crime by the peti-

tioner and thereafter presenting a false "alibi"; and that the jury's verdict was based upon an unlawful and prejudgment of guilt (App. p. 105a).

The petitioner, through counsel, requested at the outset that he be produced and be present at the *hearing* on the motion for new trial, which was denied by the Trial Court Judge.

Certainly where an issue is presented, as to the presence at "the scene of the crime at the time of death", of the petitioner or this "suspect" Hommell (whose alibi was being challenged at this hearing as "false"), then certainly the petitioner should have been present. It must be emphasized *that this "suspect" Don Hommell was present in Court at this hearing* (but not called as a witness).

In *U. S. v. Hayman*, 342 U. S. 205, this Court held:

> "Whether the prisoner should be produced depends upon the issues raised by the particular case. Where, as here, there are substantial issues of fact as to events in which the prisoner participated, the trial court should require his production for a hearing."

As appears from the motion for a new trial held and denied by the said Bergen County Court and upheld on appeal by the State Supreme Court of New Jersey (29 N. J. 561) at least one juror had unlawfully expressed and communicated his prejudged and prejudicial opinion while the trial was in progress and evidence not completed that *"Smith and his witnesses were lying in their teeth"* and *that "they (meaning the jury) were going to hang him"* (App. p. 105a).

A tavern owner, one Herbert Pelzer, who did not testify at the trial, testified at the motion for a new trial that the *said Don Hommell was not in his tavern on the night of the killing on March 4, 1957 (as he claimed) and had approached*

him on March 5, 1952 to offer a "false alibi" for him (App. p. 41a).

Trial counsel, at the motion for a new trial, attempted unsuccessfully to correct his own "neglect and failure", by trying to recall the Medical Examiner and to introduce the death certificate (never introduced as evidence at the trial) to fix the *to fix the "time of death" with a degree of certainly so vital in this case* (App. p. 37a).

The petitioner shall at this time, reserve further argument for the sake of brevity and so as not to unduly burden the Honorable Court to a more formal submission upon the Writ of Certiorari herein.

V

The petitioner was further denied due process of law by the denial of the Trial Court Judge as requested by defense counsel to produce the defendant-petitioner at the hearing on the motion for the new trial upon newly discovered evidence.

This point was raised upon appeal in the New Jersey Supreme Court, the denial of the motion for a new trial (29 N. J. 564) the Court there said:

> "Reference is made to Article 1, 10, of the N. J. Constitution and to the Vth and VIth Amendments of the U. S. Constitution in support of the contention. *The precise question has not been dealt with previously in this State* * * *
>
> Defendant's application therefore was addressed to the discretion of the court. *Although it might very well have been received favorably since the case is a capital one.* The record provided no basis for overruling the action taken."

However, this Honorable Court has held:

> "Whether the prisoner was to be prejudiced depends on the issues raised by the particular case where, as here, there are fundamental issues of fact as to events in which the prisoner participated. The trial court should require his production for a hearing."
>
> *U. S.* v. *Hayman* (*supra*) and
> *Chessman* v. *Teets* (Calif.) (decided June 10, 1957)

Here, the issue raised at the hearing required the petitioner's presence since it concerned itself primarily (among other issues) with a "false alibi" presented by a "prime suspect" one Don Hommell implicated by the petitioner as placing him "at the scene of the crime at or about the time of the killing."

As noted (*supra*), this "prime suspect" presented an alibi at the petitioner's trial that he was not near the scene of the crime at or about the time of the crime, but was in a tavern some distance from the scene of the crime. Subsequently, after the trial and at the motion for a new trial, the owner of said bar where Hommell claimed to be, gave the lie to him and testified at the hearing for a new trial that said Hommell was not in his tavern on the night in question and, furthermore, approached him the following day to offer a "false alibi" for him which he refused.

The said bar-owner did not testify at the trial either for the prosecution or the defense but subsequently became conscience-stricken and offered to tell the truth (*supra*).

This highly significant testimony was not refuted by said Hommell although he was present at the said hearing. He did not testify then nor was his trial testimony offered in rebuttal nor with all the petitioner's testimony.

It seems that petitioner's presence should have been required as requested by the defense where, as here, "there was a substantial issue of fact as to an event in which the prisoner participated".

Conclusion

That in addition to the substantial constitutional questions hereinabove outlined, it is counsel's firm belief that this conviction of Murder in the first degree of the petitioner, to this very day, is surrounded with so much doubt and confusion that this capital case cries out for review and the ends of justice would most certainly be met, if this petitioner would understand and appreciate that the Highest Court in the Land has fully reviewed his "Murder Conviction", which calls for the extreme and irrecallable penalty of death.

Wherefore, it is respectfully prayed that the petition herein, for writ of certiorari to review the judgment of conviction and sentence of death, be granted.

Respectfully submitted,

WILLIAM RICHTER,
Attorney for Petitioner.

ROBERT W. HICKS,
of Counsel.

FILE COPY

No. 264

SUPREME COURT, U.S.
FILED
JUL 31 1959
JAMES R. BROWNING, Clerk

Supreme Court of New Jersey

DOCKET NO. 9655

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

EDGAR SMITH, also known as EDGAR H. SMITH,
Defendant-Appellant.

Criminal Action
(On Indictment No. S-276-55 for Murder)

On Appeal from Order of the Bergen County Court—Law Division, Denying Defendant's Motion for New Trial

Sat Below:
O'Dea, J.C.C.

OPINION OF NEW JERSEY SUPREME COURT (FRANCIS, J.)

[Reported in 29 N. J. 561 (1959)]

Williams Press Co., 11 Commerce Street, Newark, N. J.—Market 3-8011-12

Supreme Court of New Jersey

A-108 September Term, 1958

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

EDGAR SMITH, also known as EDGAR H. SMITH,

Defendant-Appellant.

Argued April 7, 1959. Decided May 4, 1959.

MR. WILLIAM C. BRUDNICK, Special Assistant Prosecutor, argued the cause for plaintiff-respondent.

(MR. GUY W. CALISSI, Bergen County Prosecutor, attorney.)

MR. JOHN E. SELSER argued the cause for defendant-appellant.

The opinion of the Court was delivered by

FRANCIS, *J.*

The defendant Smith was convicted of murder in the first degree and was sentenced to death. The conviction was affirmed unanimously by this Court in a comprehensive opinion which concluded with the observation:

> "A reading of the record firmly and impressively convinces the impartial mind of the truth of the charge made against the defendant beyond a reasonable doubt." 27 N. J. 433, 466 (1958).

The execution was scheduled for the week of August 17, 1958. On August 8 defense counsel applied for a new trial primarily upon the ground of newly discovered evidence. After a hearing before the judge who had presided at the trial, the application was denied. This appeal attacks the legal propriety of the denial.

The original 31 page opinion of Justice WACHENFELD sets forth the circumstances of the homicide in detail. For purposes of perspective, however, repetition of certain of the facts which are pertinent to this proceeding seems necessary.

On March 4, 1957, at about 8:35 p.m., the decedent, Victoria Zielinski, 15 years of age, was walking along Wyckoff Avenue, Ramsey, New Jersey. She had visited a friend and was on her way home, more than half a mile away. The defendant Smith, who knew her casually, happened along in a borrowed car and undertook to drive her there. Instead of going directly to her home, he drove to an isolated sand pit in the neighborhood and parked. There, according to his confession, for no apparent reason the young lady said she was going to get out of the car and walk home. She said also that she intended to tell her father that he was "like the rest of the guys". He tried unsuccessfully to prevent her from getting out and when he tried to follow her, she began to yell and slap at him. He then swung at her "as hard as" he "could" with his right hand; "I don't know whether it was a fist or a slap or what." He did not know if he actually struck her. From that point on, things were vague in his mind, i.e., "that's where somebody pulled the switch." He next remembered getting back into the car alone. In the interval of vagueness he did not know whether he had struck at her more than once or whether he did so with an object other than his hand. He had a "feeling of running somewhere" or "chasing somebody". He thought he recollected "running in the sand with my shoe off." On getting back into the car, his right foot was cold; later he became aware that

he had lost his shoe. When he left the sand pit, Victoria's school books and pocketbook were in the car. After proceeding a short distance, he thought he probably threw them into the woods. In accordance with information furnished by him, the police later located them there. On reaching home, he realized that his khaki trousers and socks were bloody. He changed the trousers, went back to the pit with a lantern, and retrieved his right shoe. Later the trousers, socks, and shoes were disposed of in the manner referred to in Justice WACHENFELD's opinion, 27 N. J. at 444-445.

At the trial, Smith testified that he and Miss Zielinski quarreled while they were parked at the sand pit and he told her to get out of the car. She did so and started walking down the road. The events that allegedly occurred thereafter are recited in the earlier opinion as follows:

> "A few moments thereafter, while he was preparing to leave the pit, defendant heard a commotion and saw two figures coming up the road. He quickly got out of the car and his 'bad' ankle, which had been struck by a bowling ball earlier in the day, collapsed under him, his right shoe coming off. Since the identities of the oncoming persons were unknown and it was a lonely spot, he seized the baseball bat from the back seat of the car for protection.
>
> "As the figures approached, he recognized them as Victoria and D. H. Victoria was bleeding from a cut over her ear. Smith asked D. H. what had happened, and the latter replied the girl had fallen on the road. Smith examined the wound and in the process got blood on his hands and trousers. Feeling she should be taken to a doctor, he placed her in the automobile, but D. H. grabbed her and forcibly pulled her out, telling Smith to leave her alone, that he, D. H., would take care of her. Victoria pleaded with Smith for succor, but since D. H. knew her much better than he, Smith decided he should not interfere further and drove off,

leaving his shoe and the baseball bat behind." 27 N. J. at 446-447.

Smith's home was a short distance away. He drove there, washed up, changed his trousers, telephoned Joseph Gilroy, whose car he had been driving, and departed at about 9:10 p.m. to pick Gilroy up. On the way, he revisited the sand pit and retrieved his shoe.

Repetition of the above portion of the facts of the tragedy has been engaged in to point out the time element involved. On the basis of Smith's testimony at the trial, he picked up Miss Zielinski at about 8:35 p.m. (although at one point he said it was about 8:40 or 8:45 p.m., "it could have been later or could have been earlier."). He must have left Miss Zielinski and D.H. at the sand pit before 9 p.m. because after driving home, talking to his wife (who testified he arrived home shortly before 9 p. m.), washing up, changing his trousers and socks, attempting unsuccessfully to start a gasoline heater in the trailer where they lived, and making his telephone call, he left home at about 9:10 p.m. to pick up Gilroy. Thus the import of his allegation at the trial was that D. H. appeared at the sand pit shortly before or around 9 p.m. And the conclusion which the defense sought to have the jury reach was that D. H. committed the murder.

But impressive evidence, accepted by the jury at the trial as credible, showed that D.H. was at work in the Wyckoff Pharmacy from 6 until shortly after 9 on the evening in question. According to the pharmacist, at about 8:35 or 8:40 p.m., he was sent in the employer's station wagon to pick up some merchandise at another drug store in Ridgewood, New Jersey, normally an 18 to 20 minute round trip according to a police officer who timed it. D.H. returned to his employer's place of business at about 9 p.m., or shortly before, with the package he had been sent for and did not leave again until a short time after 9 p.m.

D. H. testified that on quitting work he drove his own car to Pelzer's Tavern in Mahwah, entering there at approximately 9:20. (On the way at about 9:05 or 9:10 he passed Myrna Zielinski, one of Victoria's sisters. Everyone concedes this fact.) After a stay there of about 20 minutes, he left and went to Pellington's milk bar on Route 17 in Ramsey. He reached that place at about 10 p.m. Corroboration was furnished by witnesses who saw him at both places at the times indicated. Thereafter, he drove to his home, also in Ramsey, arriving there around 10:15 or 10:30. He was in bed at 11 p.m.

I

The new trial application consisted principally of an effort to discredit D. H.'s testimony at the trial that he had been in Pelzer's Tavern on the night of the killing and was home in bed at 11 p.m. that night.

Attached to the moving papers was an unsworn statement of Herbert Pelzer, owner of the tavern, dated July 3, 1958, in which he stated:

> "That on the evening of March 4, 1957, I was operating my tavern in the normal pursuit of business. That on that particular night, March 4th, Charles Rockefeller known as 'Rocky' was in my establishment at 7:30 p.m. when his father came to pick him up and they both went out of my tavern. I did not see Charles Rockefeller again that night. Also, a man named [D. H.] was not in my place of business on March 4th at any time. However, on Tuesday, March 5th and thereafter, [D. H.] was constantly after me to say that he and Rockefeller were in my tavern from 9:30 p.m. and on during the evening of March 4th. The other men who were in my tavern that evening were Judge Young, Steve Wastog known as 'Lover', Tony Mihok and they all know neither one of the men named, that is [D. H.] or Rockefeller, were in my place of business on the evening of March 4, 1957. * * *."

A second statement, attached and also unsworn, was signed by George W. Self, a United States Army private, who married Mary Faye Zielinski, sister of the decedent, subsequent to the homicide. The paper is dated May 30, 1957, and asserts that on the fatal night he was out with Mary. They returned to her home about 10:15 or 10:30 and learned of Victoria's absence. They went out to look for her and stopped at a place known as Robby's Corral to inquire if anyone had seen her. Self went in and made inquiry of the owner and "one or two" other men who were there. Mary remained in the car. He was told that they had not seen her. While driving around town (he said) "[W]e saw [D. H.] two or three times, in the evening in his two-toned green Ford. One time in the heart of Ramsey and one time on Franklin Turnpike going toward Route 17." He said also that he saw H. "just a little before 10:00 p.m. as we were going to Mary's home the first time before we learned she was missing." Neither Self nor Mary Zielinski had been called as a witness at the trial.

At the hearing on the effort to obtain a new trial, Pelzer was called to testify. The procedure followed on his examination was most unusual. On direct examination, the signed statement mentioned above was shown to him. He conceded he signed it and that with one exception the contents were true. Then it was marked as an exhibit. This course was improper. The witness was in court; the affidavit was hearsay. The best and primary evidence was his oral testimony. Whatever he had to offer in the way of alleged newly discovered evidence should have been introduced in the conventional manner. It would have been proper for the prosecutor to utilize the statement on cross examination if the oral testimony deviated therefrom, and in appropriate circumstances it would have been permissible for the witness to use it to refresh his recollection. Of course, the method of handling the matter was not prejudicial to the defendant; it was advantageous to him. And

in view of the seriousness of the case, we accept the record as presented.

After the statement had been introduced, Pelzer (who had a criminal record for aiding and abetting bookmaking) testified that D. H. was not in his place of business between 7:30 p.m. on March 4, and 2 a.m. on March 5, 1957. He said also that Judge Young, Tony Mihok and Steve Wastog were present that evening.

On cross examination it developed that about a week or 10 days after the homicide he had given a voluntary statement to representatives of the Prosecutor's Office that D. H. was in the tavern on the night of March 4. Further, he admitted that before his statement was given to the State, an investigator for the defendant, one A. D. Nicol, had interviewed him. He told Nicol that D. H. was in his bar on March 4 from "9:30 on." Prior to the July 3, 1958 statement, he never informed Mr. Selser or Nicol that D. H. was not there that day.

On being asked why he told the Prosecutor that D. H. was in the tavern, he said: "It came back to me"—meaning "That's the statement I made to Mr. Nicol." At this juncture, the Court repeated the question as to why he had so advised the Prosecutor. He said: "I wasn't sure." He came to the conclusion that D. H. had not been in his tavern "a few months later" but this was after the trial was over. The record contains no explanation as to when or how this new conclusion came to the attention of the defense.

Pelzer admitted that he erred when he said in his statement of July 3, 1958, that D. H. asked him on March 5, 1957 to say that Charles Rockefeller also was in the tavern on the previous evening. Moreover, he asserted therein, and on his direct examination swore that it was true, that Rockefeller left the place at 7:30 p.m. on March 4 when his father came to pick him up and "they both went out of my tavern". But on cross examination he said he saw Rockefeller leave alone and assumed that someone picked him up. The State produced Rockefeller's father, who testified that

on March 4, 1957, he was at work as a chef in the Saddle Inn, Route 17, Upper Saddle River, from 4 p.m. until midnight and that at midnight his son picked him up there to drive him home.

The July 3, 1958 statement recites that on March 5, 1957, and thereafter D. H. "was constantly after me to say that he and Rockefeller were in my tavern from 9:30 p.m. and on during the evening of March 4th." His testimony limited the alleged request to the evening of March 5 when it was said to have occurred two or three times. And it was couched in somewhat different terms while he was on the witness stand; it was "[r]emember, I was in here last night from 9:30." Nothing more was said. Pelzer made no answer; he "walked up the other end of the bar."

At first Pelzer testified that he did not recollect who was in the tavern on March 5 when D. H. allegedly spoke to him. Then he recalled on being reminded by the Prosecutor that the place was crowded that night; reporters, detectives and others were there. The reason for the lapse was that his "memory goes once in a while." But he said the crowd stayed at one end of the bar and D. H. called him to the other end and whispered the request on two or three occasions. Later, he qualified the location of the crowd by placing them "from the middle up" and then he thought there "might have been one or two people" from the middle down to where D. H. called him and engaged in the whisper. At no time did he answer or make any comment; he simply walked away.

During the course of the murder trial, Pelzer was in court for two days in response to a defense subpoena. However, he was never called as a witness. Except for a discussion wholly unrelated to the case, the only conversation he had with Mr. Selser in those two days was to inquire as to whether he would be needed. The answer was that he would not be called "today."

Trial counsel, Mr. Selser, took the witness stand on the application. He conceded Pelzer's presence at the trial

under subpoena. But he did not summon him as a witness, since Pelzer said he "was going to say" that he did not remember whether or not D. H. was in the tavern on March 4 because the Prosecutor's men threatened him with the loss of his liquor license on account of sales to minors, if he testified for Smith. This alleged threat was reported to no one. On inquiry at the oral argument as to the reason for this failure, we were advised that counsel did not believe him. Moreover, Selser said Pelzer was "under the influence of intoxicating liquor" at the time. In the course of the Prosecutor's cross examination on this phase of the matter, Pelzer denied that he was intoxicated and said he could not recall having told Selser about a threatened loss of his license if he testified for the defendant. But, as already noted, he conceded that his original information to the Prosecutor had been given without duress or coercion.

The victim's sister's husband, George W. Self, was called. He testified that on the night of March 4, 1957, while he and Mary Zielinski were riding around looking for Victoria, he thought he saw D. H. at Robby's Corral around midnight and again near the Ramsey Police Station at about 1 a.m. He did not actually know whether he had seen D. H.; he "didn't know him that well to say for sure", having seen him only "a couple of times before." His thought was generated by Mary who remarked at the time that "it was him or it looked like him." And Self testified that he did not tell Nicol, the defense investigator that he had seen D. H. a little before 10 p.m. on March 4 as his statement attached to the application for new trial asserted. It appeared also that Self had given a statement to the Prosecutor in question-and-answer form prior to the hearing. In the course of it, in explaining that error, the following took place:

"Q. Then he put something in there that isn't the truth?

A. Yes.

Q. And that is a plain lie?

A. As I told you before, I didn't like [D. H.]. Why should I worry where he is at?

Q. But the investigator put down words that were a lie about an individual in a murder investigation and you signed it?

A. Yes."

This interrogation was included in the cross examination of Self. However, the complete statement was put in evidence, and in fairness we add the question and answer which follow those set forth above:

"Q. Just because you didn't like [D. H.]?

A. No. It wasn't that. Like I said, I don't know what he wrote. I didn't read it too close. I didn't say that to him."

Mrs. Self (formerly Mary F. Zielinski), who, according to her husband's statement, "hated" D. H., testified that she saw him at Robby's Corral about midnight on March 4, 1957. However, she did not go in. Self entered and inquired of Robby about Victoria. According to Self, Robby and one patron sitting at the end of the counter were the only persons present, although it is not clear whether he meant in addition to the person he thought was D. H. He was aware that D. H. was acquainted with Victoria. But he did not testify that any inquiry about her was put to D. H.

The three persons who, according to Pelzer, were in his tavern on March 4, 1957 and who knew that neither D. H. nor Rockefeller was there, were called by the State. Judge J. Frank Young, the municipal magistrate of Mahwah, testified that to the best of his recollection he was not in the place that evening. He said:

"I have a country office and have to have evening appointments. My diary indicates for that evening I had two appointments, one at 8:00 and one at 8:30.

"The one at 8:30 was the preparation of an income tax return for a partnership farming concern in our town which required considerable information to fill out the 1040F and in turn I had to get the information for the two individual returns including the wife of one of the partners who also was employed and, as some farmers do, they didn't keep too good books.

"I feel sure that it was at least 10:00 at the least quarter of 10:00 before I could have possibly been through."

However, he could not say categorically that he had not been in the tavern that evening. He did not know D. H.

Mihok could not remember being present at all on March 4. He testified that after the trial "when they were trying to bring this case back again" Pelzer said to him: "Don't worry, you are going to be there, you are going to be there." Further, Mihok maintained that he did not know D. H. Wastog conceded being in the tavern at about 6:30 or 6:45 after he finished work and remaining there for about an hour and a half. Then he went home.

Wastog had been subpoenaed by the defense during the trial, although previously he had given the same information to the investigator about his visit to the tavern on the evening in question. He was not called upon to testify. According to Mr. Selser, this was because he was "going to say" that he did not remember being in the tavern on March 4 and also because, like Pelzer, he, too, had been drinking. Mr. Selser said also that prior to the trial his investigator had told him that Wastog had informed him that he (Wastog) had been in the tavern until approximately 11 p.m. However, no such fact appears in the statement given to Nicol by Wastog on May 26, 1957. And Nicol was not produced as a witness.

At the hearing a number of grounds for a new trial were presented. The discussion thus far has been confined sub-

stantially to the alleged newly discovered evidence because of the stress placed upon it by the defendant. The trial court held that it was not credible and that it did not qualify as newly discovered in the legal sense.

The character of evidence to qualify as newly discovered and thus to provide a basis for the granting of a new trial is well known. It must be material to the issue and not merely cumulative, nor impeaching nor contradictory; it must have been discovered since the original trial and not discoverable prior thereto by the use of reasonable diligence; and finally its probative force must be such as to persuade the discretion of the trial court that if introduced at a new trial a contrary verdict ought to result. As to the last element, the test is probability and not possibility. *State* v. *Bunk*, 4 N. J. 482, 486 (1950); *State* v. *Haines*, 20 N. J. 438, 444 (1956). The burden of establishing the necessary factors is upon the defendant. Such motions are addressed to the sound discretion of the court; and the exercise of the discretion will not be interfered with on appeal unless a clear abuse of it is shown. The judge, who sat on the original trial, as here, is in a peculiarly advantageous position to evaluate the showing made for a new trial and particularly the credibility of the witnesses. Consequently, great weight must be given to his determination. Any other rule would be completely disruptive of the judicial process. But because life is at stake, we have paused and considered the entire record carefully in order to appraise fully the discretionary act under review.

The thrust of the Pelzer evidence is to attack the credibility of D. H.; to endeavor to show that he was not present in the tavern on the fatal night around 9:15 or 9:20, or engaged in his employment until shortly after 9 p.m. And if the premise that he was not there be accepted, the suggestion is that defendant is corroborated thereby in his assertion that D. H. was at the sand pit with Victoria shortly before or around 9 p.m. and that Smith left them at that site.

In order to reach the intrinsic merit of the issue, we pass the argument of the State that on its face such proof is merely cumulative, and by inference contradictory of D. H.'s testimony at the trial.

The trial judge, who was familiar with the entire matter, after a full hearing in which he allowed the defense wide latitude in the introduction of evidence, found Pelzer to be "a thoroughly unreliable, incredible witness, careless with the truth who has made so many varying, unfounded, untruthful statements about the fact of [D. H.'s] appearance at his tavern the night of March 4th that no person, no juror could give any statement he might make in that respect any credibility whatsoever."

Our own view of the substance of Pelzer's testimony is set out above. The mere outline is enough to demonstrate that it does not carry the ring of truth. And study of it in relation to the entire record leaves an abiding conviction of its untrustworthiness. Judged by the most liberal standard, it would not justify this Court in declaring that the trial court abused his discretion in rejecting it as a basis for vacating the verdict of the jury.

The assertions of Mr. and Mrs. Self are even more remote in their effect upon the case. The apparent purpose was to provide contradiction for D. H.'s statement at the trial that he was in bed by 11 p.m. on March 4, 1957. According to Self, he and his wife disliked him for reasons having no relation to the tragedy in question. Whatever their motivation, we agree with the trial court that the nebulous quality of the testimony, its uncertainty and the fact that Mrs. Self was not produced as a witness at the original trial, deprive it of the evidentiary impact which it should have to warrant a new trial. And this conclusion is inescapable whether their testimonial utterances are treated in isolation or in company with those of Pelzer.

The observations thus far of themselves provide the answer to the last element to be considered in reviewing the trial court's decision, *i.e.*, whether the additional evidence

would probably result in a different verdict upon a new trial. In this connection there is no doubt that the strength of the State's proof of guilt at the original trial is a factor to be weighed. For the more conclusive the evidence against the defendant, the heavier must the burden be to show that the proffered augmentation of the record ought to induce a jury to bring in a contrary result. We have re-examined the original record, as well as the earlier opinion, and find no basis whatever for withdrawing from or qualifying our determination that the evidence was devastatingly convincing of the defendant's guilt. Appraisal of the allegedly newly discovered evidence has been engaged in with a deep consciousness that our judgment represents the exhaustion of the judicial process. But it has led to concurrence in the view of the trial court that the additional proof probably would not change the result. For these reasons, we find no sufficient basis for a holding that his discretion was abused in denying a new trial.

II

In the petition for a new trial, defendant applied to the court to bring in at the hearing Dr. Raphael Gilady, the County Medical Examiner who performed an autopsy upon the decedent, so that he could be examined further with respect to the time of death. The doctor had testified on the subject at the original trial and had been cross examined by counsel for the defense. The purpose of the new request was this: The victim's skull and brain were so destroyed that death was immediate, according to the doctor. Smith's position at the trial was to the effect that he could not have had any contact with her after 9:30 p.m. So if the death could not have occurred prior to that hour, he could not be guilty.

According to the trial record, Dr. Gilady's autopsy took place between 12:30 and 1 p.m. on March 5. He certified on the death certificate that the demise occurred "about 10-11 p.m.". It was arguable that some of his testimony

was susceptible of the inference that it might have happened around midnight. Counsel pursued the matter on cross examination. And the final specific question on the subject was:

> "Q. So it was, in your judgment, not later than 11 o'clock—not earlier than 11 o'clock, I mean, or perhaps not later than one?
>
> A. It could have been earlier than 11 o'clock because the prevailing weather was so cold and the body might have stiffened up, according to standard data.
>
> With rigor mortis setting in in the normal way and the normal atmosphere and the normal temperature, the time of death would be established at 12 hours, either an hour later or an hour earlier, but with the prevailing weather being as cold as it was, it was very hard to determine when it was exactly."

Proof was adduced to show that the minimum temperature range between midnight March 4 and midnight March 5 was 12 to 22 degrees Fahrenheit. At 11:30 p.m. on March 4 it was 29 degrees or less. The readings were taken at the Newark Airport and the meteorologist testified that at Mahwah on the average they would be 10 degrees lower.

Defense counsel argued at length in his summation to the jury that on the basis of Dr. Gilady's testimony, the murder of necessity was committed long after Smith left the sand pit. And in support of his position he quoted verbatim some of the doctor's questions and answers. The Prosecutor answered the issue specifically in his closing address and he too read additional parts of the medical testimony. The jury resolved the problem by concluding that the defendant killed the decedent.

It is asserted in the moving papers that prior to the present hearing defense counsel communicated with Dr. Gilady and asked whether or not he could say with reasonable probability that the victim could have been killed as

early as 9:30 o'clock. And the affidavit sets forth that the doctor declined to discuss the matter unless the Court or the Prosecutor would authorize him to do so. For this reason, the Court was requested to order the doctor to attend the hearing and testify on the subject.

The Court declined to do so and we see no abuse of his discretion in the ruling. Manifestly, the doctor and the autopsy report were subject to subpoena and if defendant desired to have them in court, the purpose was simple of accomplishment. Moreover, it cannot escape notice that defendant produced no independent medical proof either at the trial or during the proceedings in the matter now before us.

Nor can it be ignored that the time element with respect to the death was questioned, discussed and argued about at the trial. And although the precise question now desired to be asked was not put by counsel on cross examination, the relation in time between the alleged hour of defendant's departure from the sand pit and the hour of death was fully exploited. The fact remains that regardless of the uncertainty as to the exact time of death, the jury decided on all of the facts that Smith perpetrated the homicide in the sand pit on the night of March 4 and the record irresistibly justifies their finding.

III

Error is predicated on the denial by the trial court of a request to have defendant attend the hearing on the motion for new trial. There was no statement on the motion that Smith was to be a witness; on the contrary, the moving papers contained material which was beyond Smith's personal knowledge. Nor was any representation made to the court thereafter during the hearing or at the conclusion of the testimony or even after the adverse determination that defendant had pertinent information to present in rebuttal. At the oral argument before us, counsel stated that Smith could have questioned the assertion of one witness, who

had been in attendance at Pelzer's Tavern on the evening of March 4, that he did not know D. H. Accepting the representation, such rebuttal, if introduced, could not have affected the result. Complete elimination of the witness' testimony would be without material significance in the case.

Reference is made to Article I, ¶10, of the New Jersey Constitution, and to the 5th and 6th Amendments of the United States Constitution, in support of the contention. The precise question has not been dealt with previously in this State. The weight of authority in other jurisdictions is that the constitutional right to be present applies to the trial, the proceeding for the determination of the guilt or innocence of the accused. It does not require his appearance at a post-conviction hearing on a motion for a new trial. *Barber* v. *United States*, 142 F. 2d 805 (4th Cir. 1944), cert. den. 322 U. S. 741, 88 L. Ed. 1574 (1944); *Joseph* v. *State*, 236 Ind. 529, 141 N. E. 2d 109 (1957), cert. denied (but limited to a different question), 355 U. S. 812, 2 L. Ed. 2d 30 (1957); *Carman* v. *State*, 208 Ind. 297, 196 N. E. 78 (1935); *State* v. *Johnson*, 156 La. 875, 101 So. 259 (1924); *State* v. *Dry*, 152 N. C. 813, 67 S. E. 1000 (1910); *Rigsby* v. *State*, 55 Okla. Crim. App. 61, 24 P. 2d 1016 (1933); *Commonwealth* v. *Burke*, 169 Pa. Super. 633, 84 A. 2d 254 (Pa. Super. 1951); *Cisco* v. *State*, 160 Tenn. 681, 28 S. W. 2d 338 (1930); 23 C.J.S. 307, 1325; and *cf.* *State* v. *Bentley*, 46 N. J. Super. 193, 204 (App. Div. 1957). Our Rules of Criminal Practice reflect the general rule. R.R. 3:5-4(a) calls for the presence of the defendant "at every stage of the *trial* including the impaneling of the jury and the return of the verdict, and at the imposition of sentence * * *." (Emphasis added.)

Defendant's application therefore was addressed to the discretion of the court. Although it might very well have been received favorably since the case is a capital one, the record provides no basis for overruling the action taken.

IV

Defendant argues that because the hearing on the quest for a new trial was pursuant to an order which in its form ordered the State to show cause why "the judgment of conviction * * * should not be set aside and a new trial granted * * * on the ground of the alleged newly discovered evidence", the burden was cast upon the State of sustaining the original verdict. The claim is legally frivolous. Manifestly, the onus of establishing the elements necessary to warrant a new trial is on the defendant. 39 *Am. Jur., New Trial*, §156.

Defendant prepared the moving papers and activated the matter by the order to show cause in the form chosen by him. Under the rules of criminal and civil practice, such applications are prosecuted by motion, which course should have been followed in this instance. R.R. 3:7-4; 4:62-2. The urgency of the cause undoubtedly influenced the trial court to overlook the deficiency in form.

V

The sole remaining point raised on appeal is that cross examination of the witness Wastog was curtailed improperly. There is no merit in it. Our examination of the testimony convinces us that the action taken was a legitimate exercise of discretion, and, in any event, without any prejudicial effect upon the new trial proceeding.

VI

The order of the trial court denying a new trial is affirmed.